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THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2013 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through March 29, 2013. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 29, 2013.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2013 Regular Session of the General Assembly.

Indices:

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TITLE 10

COMMERCE AND TRADE

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10-1-31. Definitions; construction.

Law reviews. — For article, "Eleventh Circuit Survey: January 1, 2008 — December 31, 2008: Article: Bankruptcy," see 60 Mercer L. Rev. 1141 (2009). For article, "The Over-Encumbered Trade-In in Chapter 13," see 29 Emory Bankr. Dev. J. 15 (2012).

10-1-33. Finance charge limitations; assignment of contract.

Law reviews. — For article, "Bankruptcy Jurisdiction Under the 1984 Amendments: One Step Backward, One Step Forward," see 3 Bank. Dev. J. 127 (1986).

RESEARCH REFERENCES

ALR. — Preemptive effect of Truth in Lending Act (TILA) 61 ALR Fed. 2d 505.

10-1-36. Disposition of motor vehicle repossessed after default; right to recover deficiency.

JUDICIAL DECISIONS

Analysis

Notice

Notice

Compliance with notice requirements.

Creditor's notice of an intention to seek a deficiency judgment sent to the debtors was sufficient. Although the certified mail receipt did not indicate the date the letter was sent, the creditor's agent gave a sworn statement based on personal knowledge that the letter was sent two days after the car was repossessed, and the address used was current and correct, although it was not the address listed in the sales contract. Versey v. Citizens Trust Bank, 306 Ga. App. 479, 702 S.E.2d 479 (2010).

Trial court erred by granting summary judgment to a finance company in the company's suit against a debtor to collect a deficiency from the sale of the debtor's repossessed vehicle because there was a genuine issue of material fact as to whether the finance company complied with the requirement under O.C.G.A. § 10-1-36(a) to mail a notice to the debtor's designated address or the address in the contract. Shell v. Tidewater Fin. Co., 318 Ga. App. 69, 733 S.E.2d 375 (2012).

Notice not required in car lease. — Lessor was not required to comply with the notice provisions of O.C.G.A. §§ 10-1-36 and 11-9-504 because the motor vehicle lease agreement the lessor entered into with the lessee was intended to be a true lease and not to evince a secured transaction; the lessor retained a meaningful reversionary interest in the car because the option price was more than nominal since the purchase option price was approximately one-third of the car's value, and the agreement contained no provision purporting to grant the lessee equity in the vehicle prior to exercise of the purchase option. Aniebue v. Jaguar Credit Corp., 308 Ga. App. 1, 708 S.E.2d 4 (2011).

ARTICLE 8

SALE OF PETROLEUM PRODUCTS, BRAKE FLUID, AND ANTIFREEZE

Part 1

Petroleum Products

10-1-155. Rules and regulations; specifications for petroleum products; penalty for violations.

JUDICIAL DECISIONS

Cited in Cisco v. State, 285 Ga. 656, 680 S.E.2d 831 (2009).

10-1-157. Collecting and testing samples of petroleum products; rules and regulations.

The Commissioner of Agriculture shall, from time to time, collect or cause to be collected samples of all petroleum products subject to regulation under this part which are sold, offered, or exposed for sale in this state and cause such samples to be tested or analyzed by the state oil chemist. The Department of Agriculture shall have the power to implement rules and regulations necessary to carry out inspection of gasoline samples as provided for by this Code section. (Ga. L. 1927, p. 279, § 13; Code 1933, § 73-218; Ga. L. 1960, p. 1043, § 13; Ga. L. 2010, p. 9, § 1-23/HB 1055; Ga. L. 2011, p. 99, § 12/HB 24.)

The 2010 amendment, effective May 12, 2010, added the last sentence.

The 2011 amendment, effective January 1, 2013, deleted the former second sentence, which read: "The state oil chemist shall certify, under oath, an analysis of each such sample and such certificate shall be competent evidence of the composition of such petroleum product in any legal proceeding." See editor's note for applicability.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

10-1-159. Inspection of self-measuring pumps; sealing accurate pumps; condemnation of inaccurate pumps; rules and regulations.

(a) It shall be the duty of the inspectors provided for in this part to familiarize themselves with the accuracy and adjusting devices on the various makes of self-measuring pumps in use; and they shall carefully inspect all of such pumps located in the territory assigned to them.

(b) All such pumps found to be giving accurate measure within the tolerance established by regulations of the Commissioner of Agriculture shall have the adjusting device sealed with an official lead and wire seal applied by an inspector duly authorized by the Commissioner of Agriculture in such a manner that the adjustment cannot be altered without breaking the seal.

(c) If any pump shall be found to be giving inaccurate measure in excess of the tolerance established by regulations of the Commissioner of Agriculture, the inspector shall then and there notify the operator of the pump, whether owner or lessee, to make the necessary adjustments, the inspector to lend his assistance with the standard measure provided for testing such pumps. After the adjustments have been made, the adjusting devices shall be sealed in the manner provided for those pumps found originally accurate. The inspector shall notify the opera-

tor, whether owner or lessee, of every pump that apparently has been altered for the purpose of giving short measure in excess of eight ounces on a measure of five gallons or that cannot be adjusted within a range of eight ounces, either over or under, on a measure of five gallons that it must immediately be adjusted, the inspector to lend his assistance with the standard measure for testing such pumps. Should the operator fail or refuse to then and there make such adjustments as shall be necessary to bring the measure within the allowed variation, the same shall be condemned and rendered inoperable immediately by the inspector examining the same; and such pump shall not again be operated without the written consent of the Commissioner of Agriculture. Inspectors shall be required to report to the Commissioner of Agriculture immediately the name and number of all pumps condemned and rendered inoperable.

(d) When any pump shall be condemned under this part by any inspector, it shall be the duty of the inspector immediately to make affidavit before the judge of the probate court of the county in which the pump is located that the pump is being operated by the person who shall be named in the affidavit, contrary to law. Thereupon the judge of the probate court shall issue an order to the person named in the affidavit to show cause before him on the day named in the order, not more than ten days nor less than three days from the issuance of the order, why the pump should not be confiscated and dismantled. On the day named in the order, it shall be the duty of the judge of the probate court to hear the respective parties and to determine whether or not the pump has been operated contrary to the provisions of this part. If the judge of the probate court shall find that the pump has been so operated, he shall forthwith issue an order adjudging the pump to be forfeited and confiscated to the state and direct the sheriff of the county to dismantle the pump and take it into his possession, and, after ten days' notice by posting or publication, as the court may direct, to sell the pump to the highest bidder for cash. The proceeds of sale, or as much thereof as may be necessary, shall be used by the sheriff, first, to pay the costs, which shall be the same as in cases of attachment, and the sheriff shall thereupon pay over and deliver the residue, if any, to the person from whose possession the pump has been taken.

(e) It shall be unlawful to install or operate any self-measuring pump which can be secretly manipulated in such manner as to give short measure. Such inaccurate self-measuring pump shall be condemned as provided in this Code section, and thereafter it shall be unlawful for any person to sell any kerosene or gasoline from such pump until such pump has been made or altered to comply with this part and has been inspected and approved for service by the inspector.

(f) It shall be unlawful for anyone to break a seal applied by an inspector to a pump without first securing consent of the Commissioner

of Agriculture, which consent may be given through one of the duly authorized inspectors.

(g) The Department of Agriculture shall have the power to implement rules and regulations necessary to carry out inspections of self-measuring pumps provided for by this Code section. (Ga. L. 1927, p. 279, § 15; Code 1933, § 73-220; Ga. L. 1960, p. 1043, §§ 1, 14; Ga. L. 2010, p. 9, § 1-24/HB 1055.)

The 2010 amendment, effective May 12, 2010, added subsection (g).

10-1-161. No fee for gasoline or kerosene inspection.

Reserved. Repealed by Ga. L. 2010, p. 9, § 1-25, effective May 12, 2010.

Editor's notes. — This Code section was based on Ga. L. 1927, p. 279, § 24; Code 1933, § 73-221.

Part 2

Brake Fluid

10-1-187. Rules and regulations; powers of Commissioner's agents; list of inspected and licensed brands; advertising of licensing.

The Commissioner shall have authority to establish and promulgate such rules and regulations as are necessary promptly and efficiently to enforce this part. All authority vested in the Commissioner by virtue of this part may, with like force and effect, be executed by such employees, agents, inspectors, and representatives of the Commissioner as he may, from time to time, designate for such purpose. The Commissioner may publish in print or electronically or furnish, upon request, a list of the brands and classes or types of brake fluid inspected by the chemist which have been found to be in accord with this part and for which a license or permit for sale has been issued; and it shall be lawful for any manufacturer, packer, seller, or distributor of brake fluid to show, by advertising, in any manner, that his or its brand of brake fluid has been inspected, analyzed, and licensed for sale by the Commissioner, acting through the state oil chemist. It shall be unlawful for any manufacturer, packer, seller, or distributor of brake fluid to advertise, in any manner, that such brake fluid so advertised for sale has been approved by the Commissioner. (Ga. L. 1956, p. 237, § 8; Ga. L. 2010, p. 838, § 10/SB 388.)

The 2010 amendment, effective June 3, 2010, inserted "in print or electronically" in the third sentence.

10-1-188. Certified analyses as evidence.

Reserved. Repealed by Ga. L. 2011, p. 99, § 13/HB 24, effective January 1, 2013.

Editor's notes. — This Code section was based on Ga. L. 1956, p. 237, § 9.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Part 3

Antifreeze

10-1-202.1. Addition of denatonium benzoate to certain antifreeze; applicability; limitation on civil and criminal liability.

(a) Antifreeze sold in this state that is manufactured after July 1, 2012, containing more than 10 percent ethylene glycol shall include denatonium benzoate at a minimum of 30 parts per million and a maximum of 50 parts per million as an aversive agent to render the antifreeze unpalatable.

(b) The requirements of subsection (a) of this Code section shall apply only to manufacturers, packagers, distributors, recyclers, or sellers of antifreeze and shall apply to recyclers notwithstanding the provisions of Code Section 10-1-208.1.

(c) The requirements of subsection (a) of this Code section shall not apply to the sale of a motor vehicle, as defined in Code Section 40-1-1, that contains antifreeze or to wholesale containers containing 55 gallons or more of antifreeze.

(d) A manufacturer, packager, distributor, recycler, or seller of antifreeze that is required to contain denatonium benzoate pursuant to this Code section shall not be liable to any person for personal injury, death, property damage, damage to the environment including without limitation natural resources, or economic loss that results solely from the inclusion of denatonium benzoate in the antifreeze; provided, however, that such limitation on liability shall only be applicable if denatonium benzoate is included in antifreeze in the concentrations mandated by subsection (a) of this Code section. Such limitation on liability shall not apply to a particular liability to the extent that the cause of that liability is unrelated to the inclusion of denatonium benzoate in antifreeze.

(e) In any criminal prosecution under this part or civil action for damages relating to the requirements of this part, a distributor or seller of antifreeze who is not the manufacturer, packager, or recycler of such antifreeze and who sells or distributes antifreeze that is labeled as containing denatonium benzoate shall not be criminally responsible for, and shall be immune from civil liability for, failure to include denatonium benzoate in such labeled package, bill of lading, receipt, or container of antifreeze; provided, however, that if such distributor or seller of antifreeze has actual knowledge that the labeled product does not contain denatonium benzoate in the concentrations mandated by subsection (a) of this Code section, such distributor or seller shall not receive the immunity provided by this subsection. (Code 1981, § 10-1-202.1, enacted by Ga. L. 2011, p. 331, § 2/HB 40; Ga. L. 2012, p. 775, § 10/HB 942.)

Effective date. — This Code section became effective July 1, 2011.

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (e).

Editor's notes. — Ga. L. 2011, p. 331, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as 'Chief's Law.'"

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting not required. — Offenses arising from a violation of O.C.G.A. § 10-1-202.1 do not, at this time, appear to be offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.

10-1-203. Inspection of antifreeze samples; annual license to sell.

Before any antifreeze shall be sold, exposed for sale, or stored, packed, or held with intent to sell within this state, a current certified test report thereof prepared by an independent laboratory recognized by the Department of Agriculture to do such testing must be submitted and evaluated under the supervision of the state oil chemist in the Department of Agriculture. Upon application of the manufacturer or packer or distributor, submission of container label, and the payment of a license fee of $50.00 for each brand or type of antifreeze submitted, the state oil chemist shall evaluate the test report so submitted. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1. If the antifreeze is not adulterated or misbranded, if it meets the standards established and promulgated by the Commissioner of Agriculture, and if the antifreeze is not a type or kind that is in violation of this part, the Commissioner shall issue the applicant a written license or permit authorizing the wholesale and retail sale by the applicant and by others of such antifreeze in this state for the fiscal year in which the license is issued,

which license or permit shall be subject to renewal annually. If the Commissioner shall find at a later date that the antifreeze product or substance to be sold, exposed for sale, or held with intent to sell has been materially altered or adulterated or that a change has been made in the name, brand, or trademark under which the antifreeze is sold or that it violates this part, the Commissioner is authorized to revoke or suspend the license or permit issued under this part of the licensee found in violation of this part after notice and hearing before the Commissioner. No license or permit for the sale of antifreeze in this state shall be issued until the application, fee, and label submission have been made as provided by this part, the certified test report has been evaluated by the state oil chemist, and the state oil chemist notifies the Commissioner of Agriculture that said antifreeze meets the requirements of this part. (Ga. L. 1975, p. 706, § 4; Ga. L. 1997, p. 416, § 1; Ga. L. 2000, p. 136, § 10; Ga. L. 2010, p. 9, § 1-26/HB 1055.)

The 2010 amendment, effective May 12, 2010, in the second sentence, substituted "Upon" for "Under" at the beginning and substituted "$50.00" for "$25.00" near the middle and added the third sentence.

10-1-206. List of inspected and licensed brands; advertising references to licensing.

The Commissioner of Agriculture may publish in print or electronically or furnish upon request a list of the brands and classes or types of antifreeze inspected by the state oil chemist during the fiscal year which have been found to be in compliance with this part and for which a license or permit for sale has been issued. It shall be lawful for any manufacturer, packer, or distributor of antifreeze to show, by advertising, in any manner, that its brand of antifreeze has been inspected, analyzed, or licensed for sale by the Commissioner of Agriculture acting through the state oil chemist. It shall be unlawful for any manufacturer, packer, or distributor of antifreeze to advertise in any manner that such antifreeze so advertised for sale has been "approved" by the Commissioner of Agriculture. (Ga. L. 1975, p. 706, § 7; Ga. L. 2010, p. 838, § 10/SB 388.)

The 2010 amendment, effective June 3, 2010, inserted "in print or electronically" in the first sentence.

10-1-208. Certified analyses as evidence.

Reserved. Repealed by Ga. L. 2011, p. 99, § 14/HB 24, effective January 1, 2013.

Editor's notes. — This Code section was based on Ga. L. 1975, p. 706, § 9. Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, pro-

vides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article on the 2011 repeal of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

ARTICLE 14

SECONDARY METALS RECYCLERS

10-1-350. Definitions.

As used in this article, the term:

(1) "Aluminum property" means aluminum forms designed to shape concrete.

(2) "Burial object" means any product manufactured for or used for identifying or permanently decorating a grave site, including, without limitation, monuments, markers, benches, and vases and any base or foundation on which they rest or are mounted.

(3) "Coil" means any copper, aluminum, or aluminum-copper condensing coil or evaporation coil including its tubing or rods. The term shall not include coil from a window air-conditioning system, if contained within the system itself, or coil from an automobile condenser.

(4) "Copper property" means any copper wire, copper tubing, copper pipe, or any item composed completely of copper.

(5) "Deliverer" means any individual who takes or transports the regulated metal property to the secondary metals recycler.

(6) "Ferrous metals" means any metals containing significant quantities of iron or steel.

(7) "Law enforcement officer" means any duly constituted peace officer of the State of Georgia or of any county, municipality, or political subdivision thereof.

(8) "Nonferrous metals" means stainless steel beer kegs and metals not containing significant quantities of iron or steel, including, without limitation, copper, brass, aluminum, bronze, lead, zinc, nickel, and alloys thereof.

(9) "Person" means an individual, partnership, corporation, joint venture, trust, association, or any other legal entity.

(10) "Personal identification card" means a current and unexpired driver's license or identification card issued by the Department of Driver Services or a similar card issued by another state, a military identification card, or a current work authorization issued by the

federal government, which shall contain the individual's name, address, and photograph.

(11) "Purchase transaction" means a transaction in which the secondary metals recycler gives consideration in exchange for regulated metal property.

(12) "Regulated metal property" means any item composed primarily of any ferrous metals or nonferrous metals and includes aluminum property, copper property, and catalytic converters but shall not include batteries, aluminum beverage containers, used beverage containers, or similar beverage containers.

(13) "Secondary metals recycler" means any person who is engaged, from a fixed location or otherwise, in the business in this state of paying compensation for regulated metal property that has served its original economic purpose, whether or not engaged in the business of performing the manufacturing process by which regulated metal property is converted into raw material products consisting of prepared grades and having an existing or potential economic value.

(14) "Seller" means the rightful owner of the regulated metal property or the individual authorized by the rightful owner of the regulated metal property to conduct the purchase transaction. (Code 1981, § 10-1-350, enacted by Ga. L. 1992, p. 2452, § 1; Ga. L. 2002, p. 415, § 10; Ga. L. 2005, p. 334, § 4-1/HB 501; Ga. L. 2007, p. 650, § 1/SB 203; Ga. L. 2009, p. 731, § 1/SB 82; Ga. L. 2012, p. 112, § 1-1/HB 872.)

The 2012 amendment, effective July 1, 2012, added paragraphs (1) through (5); redesignated former paragraphs (1) through (8) as present paragraphs (6) through (13), respectively; substituted "or" for "and" in present paragraph (9); substituted "a current work authorization issued by the federal government" for "an appropriate work authorization issued by the U.S. Citizenship and Immigration Services of the Department of Homeland Security" in present paragraph (10); substituted "the secondary" for "a secondary" in present paragraph (11); substituted "ferrous metals or nonferrous metals and includes aluminum property, copper property, and catalytic converters but shall not include batteries," for "nonferrous metals, but shall not include" in present paragraph (12); in present paragraph (13), substituted "in this state of paying compensation for regulated metal property that has served its" for "of paying compensation for ferrous or nonferrous metals that have served their" near the beginning and substituted "regulated metal property is" for "ferrous metals or nonferrous metals are" near the end; and added paragraph (14). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section by that Act shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-351. Verifiable documentation required.

(a) No secondary metals recycler shall purchase any coil unless it is purchased from:

(1) A contractor licensed pursuant to Chapter 14 of Title 43 who provides a copy of his or her valid license at the time of sale that is scanned or photocopied by the secondary metals recycler or whose scanned or photocopied license is on file with the secondary metals recycler;

(2) A seller with verifiable documentation, such as a receipt or work order, indicating that the coils are the result of a replacement of condenser coils or a heating or air-conditioning system performed by a contractor licensed pursuant to Chapter 14 of Title 43; or

(3) A secondary metals recycler who provides the documentation required in paragraphs (1) and (2) of this subsection received from a contractor or seller.

(b) No secondary metals recycler shall purchase any copper wire which appears to have been exposed to heat, charred, or burned in an attempt to remove insulation surrounding it unless it is purchased from:

(1) A contractor licensed pursuant to Chapter 14 of Title 43 who provides a copy of his or her valid license at the time of sale that is scanned or photocopied by the secondary metals recycler or whose scanned or photocopied license is on file with the secondary metals recycler;

(2) A seller with a copy of a police report showing that such seller's real property was involved in a fire; or

(3) A secondary metals recycler who provides the documentation required in paragraphs (1) and (2) of this subsection received from a contractor or seller. (Code 1981, § 10-1-351, enacted by Ga. L. 2012, p. 112, § 1-1/HB 872.)

Effective date. — This Code section became effective July 1, 2012. See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-351 as present Code Section 10-1-353.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-352. Requirements for purchase of burial objects.

No secondary metals recycler shall purchase a burial object unless it is purchased from:

(1) A funeral director licensed under the provisions of Chapter 18 of Title 43 or by another state who provides a copy of his or her valid license at the time of sale that is scanned or photocopied by the secondary metals recycler or whose scanned or photocopied license is on file with the secondary metals recycler;

(2) A cemetery owner registered pursuant to Code Section 10-14-4 or with another state who provides a copy of his or her valid registration at the time of sale that is scanned or photocopied by the secondary metals recycler or whose scanned or photocopied registration is on file with the secondary metals recycler;

(3) A manufacturer or distributor of burial objects who provides a copy of his or her valid business license at the time of sale that is scanned or photocopied by the secondary metals recycler and a letter from the owner or operator of the manufacturing or distributing business expressly recognizing the seller as an employee or authorized agent of the manufacturer or distributor or whose scanned or photocopied business license and letter are on file with the secondary metals recycler;

(4) A seller with verifiable documentation, such as a receipt from or contract with a licensed funeral director, registered cemetery owner, or manufacturer or distributor of burial objects, evidencing that such person is the rightful owner of the burial object; or

(5) A secondary metals recycler who provides the documentation required in paragraphs (1) through (4) of this Code section received from a funeral director, cemetery owner, manufacturer or distributor of burial objects, or a seller. (Code 1981, § 10-1-352, enacted by Ga. L. 2012, p. 112, § 1-1/HB 872.)

Effective date. — This Code section became effective July 1, 2012. See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-352 as present Code Section 10-1-354.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-352.1. Redesignated.

Editor's notes. — Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-352.1 as present Code Section 10-1-355.

10-1-353. Record of transaction; false statements in required affidavits transactions; penalty for making false statement in execution of affidavit.

(a) A secondary metals recycler shall maintain a legible record of all purchase transactions. Such record shall include the following information:

(1) The name and address of the secondary metals recycler;

(2) The date of the transaction;

(3) The weight, quantity, or volume and a description of the type of regulated metal property purchased in a purchase transaction. For purposes of this paragraph, the term "type of regulated metal property" shall include a general physical description, such as wire, tubing, extrusions, or castings;

(4) A digital photograph or photographs or a digital video image or images of the regulated metal property which shows the regulated metal property in a reasonably clear manner;

(5) The amount of consideration given in a purchase transaction for the regulated metal property and a copy of the check or voucher or documentation evidencing the electronic funds transfer given as consideration for such purchase transaction;

(6) A signed and sworn affidavit from the seller stating that such person is the rightful owner of the regulated metal property or has been authorized to sell the regulated metal property being sold;

(7) A signed and sworn affidavit from the seller stating that he or she understands that: "A secondary metals recycler is any person who is engaged, from a fixed location or otherwise, in the business in this state of paying compensation for regulated metal property that has served its original economic purpose, whether or not engaged in the business of performing the manufacturing process by which regulated metal property is converted into raw material products consisting of prepared grades and having an existing or potential economic value. No ferrous metals, nonferrous metals, aluminum property, copper property, or catalytic converters (batteries, aluminum beverage containers, used beverage containers, or similar beverage containers are exempt) may be purchased by a secondary metals recycler unless such secondary metals recycler is a holder of a valid permit issued pursuant to Article 14 of Chapter 1 of Title 10 of the Official Code of Georgia Annotated";

(8) A scanned or photocopied copy of a valid personal identification card of the seller and the deliverer, if such person is different from the seller;

(9) A photograph, videotape, or digital recording depicting a recognizable facial image of the seller and the deliverer, if such person is different from the seller, employing technology allowing the image to be retained in electronic storage and in a transferable format;

(10) The distinctive number from, and type of, the personal identification card of the seller and the deliverer, if such person is different from the seller;

(11) The vehicle license tag number or vehicle identification number, state of issue, and the type of vehicle, if available, used to deliver the regulated metal property to the secondary metals recycler. For purposes of this paragraph, the term "type of vehicle" shall mean an automobile, pickup truck, van, or truck; and

(12) A scanned or photocopied copy of the verifiable documentation, reports, licenses, and registrations, required pursuant to Code Sections 10-1-351 and 10-1-352.

(b) A secondary metals recycler shall maintain or cause to be maintained the information required by subsection (a) of this Code section for not less than two years from the date of the purchase transaction.

(c) When the metal being purchased is a motor vehicle, the seller shall either provide the title to such motor vehicle or fully execute a statement on a form as promulgated by the Department of Revenue in accordance with Code Section 40-3-36. The secondary metals recycler shall forward the title or form to the Department of Revenue within 72 hours of receipt of the title or form.

(d) It shall be unlawful to make a false statement in executing the affidavit required by either paragraph (6) or (7) of subsection (a) of this Code section, and the making of a false statement shall be punishable as an act of false swearing under Code Section 16-10-71. (Code 1981, § 10-1-351, enacted by Ga. L. 1992, p. 2452, § 1; Ga. L. 2009, p. 731, § 2/SB 82; Code 1981, § 10-1-353, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.)

The 2012 amendment, effective July 1, 2012, redesignated former Code Section 10-1-351 as present Code Section 10-1-353; rewrote subsection (a); in subsection (c), in the first sentence, substituted "seller" for "person offering to sell the motor vehicle to a secondary metals recycler" at the beginning, substituted "statement on a form" for "cancellation of certificate of title for scrap vehicles form" in the middle, and deleted ", Motor Vehicle Division, designated as MV-1SP," following "Department of Revenue" near the end, and deleted "MV-1SP" preceding "form" in the second sentence; and added subsection (d). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-353 as present Code Section 10-1-356.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code

section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-354. Inspections by law enforcement officers.

During the usual and customary business hours of a secondary metals recycler, a law enforcement officer shall, after properly identifying himself or herself as a law enforcement officer, have the right to inspect:

(1) Any and all regulated metal property in the possession of the secondary metals recycler; and

(2) Any and all records required to be maintained under Code Section 10-1-353. (Code 1981, § 10-1-352, enacted by Ga. L. 1992, p. 2452, § 1; Code 1981, § 10-1-354, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.)

The 2012 amendment, effective July 1, 2012, redesignated former Code Section 10-1-352 as present Code Section 10-1-354; inserted "or herself" near the end of the introductory paragraph; deleted "purchased" preceding "regulated" near the beginning of paragraph (1); and substituted "Code Section 10-1-353" for "Code Section 10-1-351" near the end of paragraph (2). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-354 as present Code Section 10-1-357.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-355. Conditions and limitations on payments for regulated metal property; exception for transaction between business entities.

(a) A secondary metals recycler shall pay only by check, electronic funds transfer, or voucher for regulated metal property.

(b) Any check, electronic funds transfer, or voucher shall be payable only to the person recorded as the seller of the regulated metal property to the secondary metals recycler.

(c) Any voucher shall be provided to the seller at the time of the purchase transaction or mailed to the seller at the address indicated on the personal identification card of the seller presented at the time of such transaction. If the voucher is provided to the seller at the time of the purchase transaction and not mailed to the seller, the secondary metals recycler shall not redeem the voucher for three days from the date of the purchase transaction. The voucher shall include the date of purchase, name of the seller, the amount paid for the regulated metal

property, a detailed description of the regulated metal property purchased, information as to whether the voucher was mailed or provided at the time of the purchase transaction, the first date on which the voucher may be redeemed, and the date on which the voucher expires. The voucher may only be redeemed for cash by the person whose name appears on the voucher as the seller or by such person's heirs or legal representative. If a voucher is not redeemed by the person whose name appears on the voucher as the seller or by such person's heirs or legal representative within six months of the date of the transaction, the voucher shall expire and the secondary metals recycler shall not be required to honor the voucher after the expiration date.

(d) A secondary metals recycler shall be prohibited from: (1) redeeming or cashing any check or electronic funds transfer paid to a seller for regulated metal property; and (2) providing or permitting any mechanism on the premises of the secondary metals recycler for the redemption or cashing of any check or electronic funds transfer.

(e) The provisions of this Code section shall not apply to any transaction between business entities. (Code 1981, § 10-1-352.1, enacted by Ga. L. 2009, p. 731, § 3/SB 82; Code 1981, § 10-1-355, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.)

The 2012 amendment, effective July 1, 2012, redesignated former Code Section 10-1-352.1 as present Code Section 10-1-355; rewrote subsections (a) and (b); added subsections (c) and (d); and redesignated former subsection (c) as present subsection (e). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-355 as present Code Section 10-1-358.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-356. Hold on regulated metal property believed to be stolen; notice; release of hold.

(a) Whenever a law enforcement officer has reasonable cause to believe that any item of regulated metal property in the possession of a secondary metals recycler has been stolen, the law enforcement officer may issue a hold notice to the secondary metals recycler. The hold notice shall be in writing, shall be delivered to the secondary metals recycler, shall specifically identify those items of regulated metal property that are believed to have been stolen and that are subject to the notice, and shall inform the secondary metals recycler of the information contained in this Code section. Upon receipt of the notice issued in accordance with this Code section, the secondary metals recycler receiving the notice shall not process or remove the items of regulated metal property identified in the notice, or any portion thereof,

from the premises of or place of business of the secondary metals recycler for 15 calendar days after receipt of the notice by the secondary metals recycler, unless sooner released by a law enforcement officer.

(b) No later than the expiration of the 15 day period, a law enforcement officer may issue a second hold notice to the secondary metals recycler, which shall be an extended hold notice. The extended hold notice shall be in writing, shall be delivered to the secondary metals recycler, shall specifically identify those items of regulated metal property that are believed to have been stolen and that are subject to the extended hold notice, and shall inform the secondary metals recycler of the information contained in this Code section. Upon receipt of the extended hold notice issued in accordance with this Code section, the secondary metals recycler receiving the extended hold notice shall not process or remove the items of regulated metal property identified in the notice, or any portion thereof, from the premises of or place of business of the secondary metals recycler for 30 calendar days after receipt of the extended hold notice by the secondary metals recycler, unless sooner released by a law enforcement officer.

(c) At the expiration of the hold period or, if extended in accordance with this Code section, at the expiration of the extended hold period, the hold is automatically released and the secondary metals recycler may dispose of the regulated metal property unless other disposition has been ordered by a court of competent jurisdiction. (Code 1981, § 10-1-353, enacted by Ga. L. 1992, p. 2452, § 1; Code 1981, § 10-1-356, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.)

The 2012 amendment, effective July 1, 2012, redesignated former Code Section 10-1-353 as present Code Section 10-1-356; and inserted "premises of or" near the middle of the last sentence of subsections (a) and (b). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-356 as present Code Section 10-1-359.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-357. Contesting identification or ownership of regulated metal property; action to recover property.

(a) If the secondary metals recycler contests the identification or ownership of the regulated metal property, the party other than the secondary metals recycler claiming ownership of any regulated metal property in the possession of a secondary metals recycler may, provided that a timely report of the theft of the regulated metal property was made to the proper authorities, bring an action in the superior or state

court of the county in which the secondary metals recycler is located. The petition for such action shall include a description of the means of identification of the regulated metal property utilized by the petitioner to determine ownership of the regulated metal property in the possession of the secondary metals recycler.

(b) When a lawful owner recovers stolen regulated metal property from a secondary metals recycler who has complied with the provisions of this article, and the seller or deliverer is convicted of theft by taking, theft by conversion, a violation of this article, theft by receiving stolen property, or criminal damage to property in the first degree, the court shall order the defendant to make full restitution, including, without limitation, attorneys' fees, court costs, and other expenses to the secondary metals recycler or lawful owner, as appropriate. (Code 1981, § 10-1-354, enacted by Ga. L. 1992, p. 2452, § 1; Ga. L. 2007, p. 650, § 1.1/SB 203; Code 1981, § 10-1-357, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.)

The 2012 amendment, effective July 1, 2012, redesignated former Code Section 10-1-354 as present Code Section 10-1-357; substituted "seller or deliverer" for "person who sold the regulated metal property to the secondary metals recycler" in the middle of subsection (b); and deleted former subsection (c), which read: "When a lawful owner recovers stolen regulated metal property from a secondary metals recycler who has knowingly and intentionally not complied with the provisions of this article, and the secondary metals recycler is convicted of theft by taking, theft by conversion, theft by receiving stolen property, or a violation of this article, the court shall order the defendant to make full restitution, including, without limitation, attorneys' fees, court costs, and other expenses to the lawful owner." See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-357 as present Code Section 10-1-361.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-358. Purchases of regulated metal property exempted from application of article.

This article shall not apply to purchases of regulated metal property from:

(1) Organizations, corporations, or associations registered with the state as charitable, philanthropic, religious, fraternal, civic, patriotic, social, or school-sponsored organizations or associations or from any nonprofit corporations or associations;

(2) A law enforcement officer acting in an official capacity;

(3) A trustee in bankruptcy, executor, administrator, or receiver who has presented proof of such status to the secondary metals recycler;

(4) Any public official acting under judicial process or authority who has presented proof of such status to the secondary metals recycler;

(5) A sale on the execution, or by virtue, of any process issued by a court if proof thereof has been presented to the secondary metals recycler; or

(6) A manufacturing, industrial, or other commercial vendor that generates or sells regulated metal property in the ordinary course of its business, provided that such vendor is not a secondary metals recycler. (Code 1981, § 10-1-355, enacted by Ga. L. 1992, p. 2452, § 1; Code 1981, § 10-1-358, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.)

The 2012 amendment, effective July 1, 2012, redesignated former Code Section 10-1-355 as present Code Section 10-1-358; and added ", provided that such vendor is not a secondary metals recycler" at the end of paragraph (6). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 112, § 1/HB 872, effective July 1, 2012, redesignated former Code Section 10-1-358 as present Code Section 10-1-363.

Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-359. Prohibited acts.

It shall be unlawful for:

(1) A secondary metals recycler to engage in the purchase or sale of regulated metal property between the hours of 7:00 P.M. and 7:00 A.M.; and

(2) Any person to give a false or altered personal identification card, vehicle license tag number, or vehicle identification number to a secondary metals recycler as part of a purchase transaction. (Code 1981, § 10-1-356, enacted by Ga. L. 1992, p. 2452, § 1; Code 1981, § 10-1-359, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.)

The 2012 amendment, effective July 1, 2012, redesignated former Code Section 10-1-356 as present Code Section 10-1-359; substituted "7:00 P.M. and 7:00 A.M." for "9:00 P.M. and 7:00 A.M." near the end of paragraph (1); and substituted the present provisions of paragraph (2) for the former provisions, which read: "Any person to give a false statement of ownership or to give a false or altered identification or vehicle tag number and receive money or other consideration from a secondary metals recycler in return for regulated metal property." See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the

2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-359.1. Registration of secondary metals recycler; electronic data base; authority of sheriff; penalty for violation.

(a) It shall be unlawful for any secondary metals recycler to purchase regulated metal property in any amount without being registered pursuant to this Code section. If the secondary metals recycler is a person other than an individual, such person shall register with the sheriff of each county in which the secondary metals recycler maintains a place of business. If the secondary metals recycler is an individual, he or she shall register with the sheriff of the county in which he or she resides or if such individual is a nonresident of this state, he or she shall register with the sheriff of the county in Georgia where he or she primarily engages or intends to primarily engage in business as a secondary metals recycler. The secondary metals recycler shall declare on a form promulgated by the Secretary of State and provided by the sheriff that such secondary metals recycler is informed of and will comply with the provisions of this article. The forms and information required for such registration shall be promulgated by the Secretary of State. The sheriff shall register the secondary metals recycler and shall keep a record of each registration. Each registration shall be valid for a 12 month period.

(b) The record of each registration shall be entered into an electronic data base accessible statewide. Such data base shall be established through coordination with the Secretary of State and shall be searchable by all law enforcement agencies in this state.

(c) The sheriff shall be authorized to:

(1) Assess and require payment of a reasonable registration fee prior to registering the secondary metals recycler, not to exceed $200.00;

(2) Delegate to personnel in the sheriff's office the registration of secondary metals recyclers and entering into the data base of the records of such registrations; and

(3) Enter into contracts with the governing authority of a county, municipality, or consolidated government for such governing authority to provide for the registration of secondary metals recyclers and the entering into the data base of the records of such registrations by other law enforcement agencies or by staff of the governing authority. Any such contract shall provide for reimbursement to such governing authority for the registrations or entry of the records of such registrations into the data base.

(d) Any secondary metals recycler convicted of violating this Code section shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1981, § 10-1-359.1, enacted by Ga. L. 2012, p. 112, § 1-1/HB 872.)

Effective date. — This Code section became effective July 1, 2012. See editor's note for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, Code Section 10-1-360, as enacted by Ga. L. 2012, p. 112, § 1-1/HB 872, was redesignated as Code Section 10-1-359.1.

Editor's notes. — Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-359.2. Penalties for violations.

(a) Except as provided for in subsection (d) of Code Section 10-1-359.1, any person who buys or sells regulated metal property in violation of any provision of this article:

(1) For a first offense, shall be guilty of a misdemeanor;

(2) For a second offense, shall be guilty of a misdemeanor of a high and aggravated nature; and

(3) For a third or subsequent offense, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years.

(b) Any person who buys or sells regulated metal property in violation of any provision of this article shall be liable in a civil action to any person who was the victim of a crime involving such regulated metal property for the full value of the regulated metal property, any repairs and related expenses incurred as a result of such crime, litigation expenses, and reasonable attorneys' fees. (Code 1981, § 10-1-357, enacted by Ga. L. 1992, p. 2452, § 1; Ga. L. 2007, p. 650, § 2/SB 203; Code 1981, § 10-1-359.2, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.)

The 2012 amendment, effective July 1, 2012, redesignated former Code Section 10-1-357 as Code Section 10-1-361, and rewrote this Code section. See the editor's note for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, Code Section 10-1-361, as enacted by Ga. L. 2012, p. 112, § 1-1/HB 872, was redesignated as Code Section 10-1-359.2. In the introductory language of subsection (a), "Code Section 10-1-359.1" was substituted for "Code Section 10-1-360".

Editor's notes. — Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U. L. Rev. 238 (2012).

10-1-359.3. Items declared contraband; forfeiture of contraband.

(a) As used in this Code section, the term:

(1) "Crime" means:

(A) Theft by taking in violation of Code Section 16-8-2, theft by conversion in violation of Code Section 16-8-4, or theft by receiving stolen property in violation of Code Section 16-8-7 if the subject of the theft was regulated metal property;

(B) Criminal damage to property in the first degree in violation of paragraph (2) of subsection (a) of Code Section 16-7-22; or

(C) A criminal violation of this article.

(2) "Proceeds" shall have the same meaning as set forth in Code Section 16-13-49.

(3) "Property" shall have the same meaning as set forth in Code Section 16-13-49.

(b) The following are declared to be contraband, and no person shall have a property right in them:

(1) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a crime and any proceeds derived or realized therefrom; and

(2) Any weapon possessed, used, or available for use in any manner to facilitate a crime.

(c) Any property subject to forfeiture pursuant to subsection (b) of this Code section shall be forfeited in accordance with the procedures set forth in Code Section 16-13-49. (Code 1981, § 10-1-359.3, enacted by Ga. L. 2012, p. 112, § 1-1/HB 872.)

Effective date. — This Code section became effective July 1, 2012. See editor's note for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, Code Section 10-1-362, as enacted by Ga. L. 2012, p. 112, § 1-1/HB 872, was redesignated as Code Section 10-1-359.3.

Editor's notes. — Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-359.4. Comprehensive nature of this article; authority of localities.

(a) The General Assembly finds that this article is a matter of state-wide concern. This article supersedes and preempts all rules, regulations, codes, ordinances, and other laws adopted by any county,

municipality, consolidated government, or other local governmental agency regarding the sale or purchase of regulated metal property except as allowed in this Code section.

(b) Political subdivisions of this state may enact rules, regulations, codes, ordinances, and other laws:

(1) Affecting the land use and zoning relating to secondary metals recyclers; and

(2) Issuing occupational tax certificates to secondary metals recyclers, imposing occupational taxes, imposing regulatory fees as allowed in Code Section 48-13-9, or revoking their occupational tax certificates. (Code 1981, § 10-1-358, enacted by Ga. L. 2007, p. 650, § 3/SB 203; Code 1981, § 10-1-359.4, as redesignated by Ga. L. 2012, p. 112, § 1-1/HB 872.)

The 2012 amendment, effective July 1, 2012, redesignated former Code Section 10-1-358 as Code Section 10-1-363; designated the existing provisions of this Code section as subsection (a); added "except as allowed in this Code section" at the end of the last sentence in subsection (a); and added subsection (b). See editor's note for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, Code Section 10-1-363, as enacted by Ga. L. 2012, p. 112, § 1-1/HB 872, was redesignated as Code Section 10-1-359.4.

Editor's notes. — Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

10-1-359.5. (For effective date, see note) Required information from secondary metals recyclers; role of Georgia Bureau of Investigation.

(a) Each secondary metals recycler shall provide all of the information required by subsection (a) of Code Section 10-1-353 for each transaction, except for the amount of consideration given in a purchase transaction for the regulated metal property specified in paragraph (5) of subsection (a) of such Code section, to the Georgia Bureau of Investigation.

(b) The Georgia Bureau of Investigation shall establish and maintain a data base of all information required to be provided pursuant to subsection (a) of this Code section. Such data base shall be accessible and searchable by all law enforcement agencies in this state. The Georgia Bureau of Investigation shall promulgate rules and regulations and establish procedures necessary to carry into effect, implement, and enforce the provisions of this Code section. Such rules and regulations shall include, but shall not be limited to, the time, manner, and method of the transmittal of the information by the secondary metals recyclers

to the Georgia Bureau of Investigation. (Code 1981, § 10-1-359.5, enacted by Ga. L. 2012, p. 112, § 2-1/HB 872.)

Delayed effective date. — Ga. L. 2012, p. 112, § 4-1(b)/HB 872 provides that this Code section becomes effective upon the effective date of a specific appropriation of funds for the purposes of this Act as expressed in a line item making specific reference to such funds in a General Appropriations Act enacted by the General Assembly. Funds were not appropriated at the 2012 or 2013 session of the General Assembly.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, Code Section 10-1-360.1, as enacted by Ga. L. 2012, p. 112, § 1-1/HB 872, was redesignated as Code Section 10-1-359.5.

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012).

ARTICLE 15

DECEPTIVE OR UNFAIR PRACTICES

PART 1

UNIFORM DECEPTIVE TRADE PRACTICES ACT

10-1-372. When trade practices are deceptive; common-law and other remedies unaffected.

JUDICIAL DECISIONS

Confusingly similar names.

Promoter presented sufficient evidence of the strength of the promoter's marks and of actual confusion amongst the relevant consumer class to avoid summary judgment, and the appellate court reversed the district court's grant of summary judgment for the group and remanded for trial on the claims of infringement under the Lanham Act, 15 U.S.C. § 1114, false designation of origin under 15 U.S.C. § 1125, deceptive trade practices under O.C.G.A. § 10-1-372 and unfair competition under O.C.G.A. § 23-2-55 et seq. because: (1) the car dealership promoter had shown actual confusion and the district court erred by overvaluing lack of confusion exhibited by the general public, an audience with no experience in the advertisement buying market; (2) "Slash-It! Sales Event" attained federal incontestable status, so the district court erred in holding that the mark was merely descriptive, and not entitled to strong protection; (3) the promoter created a disputed issue of material fact that the slasher slogans left the same impression, weighing in favor of likelihood of confusion; and (4) the similarities between the two sales allowed for the inference that a reasonable consumer could possibly attribute the products here to the same source. Caliber Auto. Liquidators, Inc. v. Premier Chrysler, Jeep, Dodge, LLC, 605 F.3d 931 (11th Cir. 2010).

Sufficient allegations of unfair practices involving cellular phones. — Because plaintiff cellular telephone trademark holder's complaint properly alleged that defendant competitor was a knowing and willing participant in an enterprise that bought the holder's phones in bulk then altered the phones to circumvent prepaid airtime then resold those phones under the holder's marks, the complaint properly stated claims for unfair competition and deceptive trade practices. Tracfone Wireless, Inc. v. Zip Wireless Prods., 716 F. Supp. 2d 1275 (N.D. Ga. 2010).

No likelihood of confusion shown. — In a lawsuit between business entities over a failed joint venture to develop a multimedia e-mail software program to be marketed to a certain company, there was no showing of a likelihood of confusion as to the source of the program to support a claim under the Unfair and Deceptive Trade Practices Act, O.C.G.A. § 10-1-372(a). OnBrand Media v. Codex Consulting, Inc., 301 Ga. App. 141, 687 S.E.2d 168 (2009).

Trade dress claim infringement. — Plaintiff adequately stated a claim for trade dress infringement; plaintiff alleged that the plaintiff had protectable trade dress in the overall shape and profile of the product and the configuration, design, and placement of the door of the plaintiff's electric digital smoker, which adequately identified the features that comprised the plaintiff's alleged trade dress. Masterbuilt Mfg. v. Bruce Foods Corp., No. 4:10-CV-35 (CDL), 2011 U.S. Dist. LEXIS 4009 (M.D. Ga. Jan. 14, 2011).

Evidence of improper competition with former employer. — Evidence that a former employee solicited an employer's former students and clients on behalf of the employee's new company, despite promising not to do so, falsely held out as being Project Management Professional certified, falsely represented that the employer's customers were the employee's company's customers, and used nearly duplicate versions of certain course materials without the employer's consent, supported a jury's finding that the employee violated the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq. Trotman v. Velociteach Project Mgmt., LLC, 311 Ga. App. 208, 715 S.E.2d 449 (2011), cert. denied, No. S11C1920, 2012 Ga. LEXIS 66 (Ga. 2012).

RESEARCH REFERENCES

ALR. — Practices forbidden by state deceptive trade practice and consumer protection acts — pyramid or ponzi or referral sales schemes, 48 ALR6th 511.

10-1-373. Enjoining deceptive trade practices; costs and attorney's fees; relief cumulative.

JUDICIAL DECISIONS

Requirement of harm. — O.C.G.A. § 10-1-373(a) of the Georgia Deceptive Trade Practices Act required plaintiff dry cleaners to allege they were likely to be damaged by a deceptive trade practice and the allegations that defendant natural gas supplier disseminated information about future natural gas prices did not pose any future harm, nor were the dry cleaners entitled to injunctive relief for a hypothetical future harm; thus, the Deceptive Trade Practices Act claims failed. Byung Ho Cheoun v. Infinite Energy, Inc., No. 09-13902, 2010 U.S. App. LEXIS 1866 (11th Cir. Jan. 27, 2010) (Unpublished).

Part 2

Fair Business Practices Act

10-1-390. Short title.

Law reviews. — For annual survey on class actions, see 62 Mercer L. Rev. 1107 (2011).

JUDICIAL DECISIONS

Fair Business Practices Act claim covered by arbitration clause. — Trial court erred in refusing to compel arbitration as to all counts of buyers' complaint against a seller to recover damages for construction defects in the buyers' new home because the claim the buyers asserted under the Fair Business Practices Act of 1975, O.C.G.A. § 10-1-390 et seq., was covered by the arbitration clause of the parties' agreement since the arbitration clause of the agreement was specifically included within the ambit of the Georgia Arbitration Code (GAC) by O.C.G.A. § 9-9-2(c)(8) when the parties initialed the arbitration clause as required by the GAC; because the GAC applied to the agreement's arbitration clause by reason of § 9-9-2(c)(8), the arbitration clause was not excluded from the GAC by the "consumer transactions" exception of § 9-9-2(c)(7). Order Homes, LLC v. Iverson, 300 Ga. App. 332, 685 S.E.2d 304 (2009).

Not deceptive for association to stop water service for nonpayment. — Nothing in Georgia's Fair Business Practices Act (GFBPA), O.C.G.A. § 10-1-390 et seq., arguably implied that it was unfair or deceptive for a homeowners association or the associations' management company, after providing notice, to stop water service for admitted nonpayment (particularly when the other homeowners have to pay higher assessments as a result of the delinquencies). Harris v. Liberty Cmty. Mgmt., 702 F.3d 1298 (11th Cir. 2012).

Showing required by plaintiff similar to fraud claim. — Like a claim for common-law fraud, a claim under the Fair Business Practices Act of 1975, O.C.G.A. § 10-1-390 et seq., requires a showing that a defendant committed a volitional act constituting an unfair or deceptive act or practice conjoined with culpable knowledge of the nature, but not necessarily the illegality, of the act. Paulk v. Thomasville Ford Lincoln Mercury, Inc., 317 Ga. App. 780, 732 S.E.2d 297 (2012).

Summary judgment.

Trial court erred by failing to grant a succeeding franchisee's motion for summary judgment in a fraud suit brought by car dealership consumers as the consumers failed to establish the succeeding franchisee's participation or involvement in any of the complained of transactions; thus, no unfair business violations were established, and no direct claim against a transferee was permitted under the Bulk Transfer Act, O.C.G.A. § 11-6-101 et seq. Additionally, the consumers' claims under Georgia's Racketeer Influenced and Corrupt Organizations statute, O.C.G.A. § 16-14-1 et seq., likewise failed since the uncontroverted evidence established without question that the succeeding franchisee did not make any misrepresentations to the consumers nor participated in any of the transactions that formed the basis of the consumers' claims. Summit Auto. Group, LLC v. Clark Kia Motors Ame., Inc., 298 Ga. App. 875, 681 S.E.2d 681 (2009).

Cited in Tookes v. Murray, 297 Ga. App. 765, 678 S.E.2d 209 (2009); Salvador v. Bank of Am., N.A. (In re Salvador), 456 B.R. 610 (Bankr. M.D. Ga. 2011).

10-1-391. Purpose and construction of part.

JUDICIAL DECISIONS

Part applied to debt collection.

Even if a homeowner's debt survived cancellation, a history of the debt was insufficient to prove a chain of valid written assignments from the original creditor to the assignee under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., and the Fair Business Practices Act, O.C.G.A. § 10-1-391 et seq. Arrow Fin. Servs., LLC v. Wright, 311 Ga. App. 319, 715 S.E.2d 725 (2011), cert. denied, No. S11C1924, 2012 Ga. LEXIS 51 (Ga. 2012).

Federal Trade Commission Act standards apply.

District court erred when the court denied a consumer's motion for default judg-

ment on the consumer's claim that a debt collector violated Georgia's Fair Business Practices Act of 1975 (FBPA), O.C.G.A. § 10-1-390 et seq., because the consumer's alleged debt was incurred during a consumer transaction for lawn care services, and the consumer pleaded facts in the consumer's complaint sufficient to establish that the collector was part of the consumer credit and debt collection industry, and further, the collector's conduct necessarily violated the FBPA when it violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692-92p, as the FBPA was to be interpreted in accordance with the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), pursuant to O.C.G.A. § 10-1-391(b), and for purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, a violation of the FDCPA should be deemed an unfair or deceptive act or practice in violation of that Act pursuant to 15 U.S.C. § 1692l(a). Gilmore v. Account Mgmt., No. 09-14983, 2009 U.S. App. LEXIS 27601 (11th Cir. Dec. 16, 2009).

10-1-392. Definitions; when intentional violation occurs.

(a) As used in this part, the term:

(1) "Administrator" means the administrator appointed pursuant to subsection (a) of Code Section 10-1-395 or his or her delegate.

(2) "Campground membership" means any arrangement under which a purchaser has the right to use, occupy, or enjoy a campground membership facility.

(3) "Campground membership facility" means any campground facility at which the use, occupation, or enjoyment of the facility is primarily limited to those purchasers, along with their guests, who have purchased a right to make reservations at future times to use the facility or who have purchased the right periodically to use the facility at fixed times or intervals in the future, but shall not include any such arrangement which is regulated under Article 5 of Chapter 3 of Title 44.

(4) "Career consulting firm" means any person providing services to an individual in conjunction with a career search and consulting program for the individual, including, but not limited to, counseling as to the individual's career potential, counseling as to interview techniques, and the identification of prospective employers. A "career consulting firm" shall not guarantee actual job placement as one of its services. A "career consulting firm" shall not include any person who provides these services without charging a fee to applicants for those services or any employment agent or agency regulated under Chapter 10 of Title 34.

(5) "Child support enforcement" means the action, conduct, or practice of enforcing a child support order issued by a court or other tribunal.

(6) "Consumer" means a natural person.

(7) "Consumer acts or practices" means acts or practices intended to encourage consumer transactions.

(8) "Consumer report" means any written or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, or credit capacity which is used or intended to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for:

(A) Credit or insurance to be used primarily for personal, family, or household purposes; or

(B) Employment consideration.

(9) "Consumer reporting agency" or "agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.

(10) "Consumer transactions" means the sale, purchase, lease, or rental of goods, services, or property, real or personal, primarily for personal, family, or household purposes.

(11) "Department" means the Department of Human Services.

(12) "Documentary material" means the original or a copy, whether printed, filmed, or otherwise preserved or reproduced, by whatever process, including electronic data storage and retrieval systems, of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or record wherever situate.

(13) "Examination" of documentary material means inspection, study, or copying of any such material and the taking of testimony under oath or acknowledgment with respect to any such documentary material.

(14) "File" means, when used in connection with information on any consumer, all of the information on that consumer recorded or retained by a consumer reporting agency regardless of how the information is stored.

(14.1) "Food" means articles used for food or drink for human consumption, chewing gum, and articles used for components of any such article.

(15) "Going-out-of-business sale" means any offer to sell to the public or sale to the public of goods, wares, or merchandise on the

implied or direct representation that such sale is in anticipation of the termination of a business at its present location or that the sale is being held other than in the ordinary course of business and includes, without being limited to, any sale advertised either specifically or in substance to be a sale because the person is going out of business, liquidating, selling his or her entire stock or 50 percent or more of his or her stock, selling out to the bare walls, selling because the person has lost his or her lease, selling out his or her interest in the business, or selling because everything in the business must be sold or that the sale is a trustee's sale, bankruptcy sale, save us from bankruptcy sale, insolvency sale, assignee's sale, must vacate sale, quitting business sale, receiver's sale, loss of lease sale, forced out of business sale, removal sale, liquidation sale, executor's sale, administrator's sale, warehouse removal sale, branch store discontinuance sale, creditor's sale, adjustment sale, or defunct business sale.

(16) "Health spa" means an establishment which provides, as one of its primary purposes, services or facilities which are purported to assist patrons to improve their physical condition or appearance through change in weight, weight control, treatment, dieting, or exercise. The term includes an establishment designated as a "reducing salon," "health spa," "spa," "exercise gym," "health studio," "health club," or by other terms of similar import. A health spa shall not include any of the following:

(A) Any nonprofit organization;

(B) Any facility wholly owned and operated by a licensed physician or physicians at which such physician or physicians are engaged in the actual practice of medicine; or

(C) Any such establishment operated by a health care facility, hospital, intermediate care facility, or skilled nursing care facility.

(16.1) "Kosher food disclosure statement" means a statement which:

(A) Discloses to consumers practices relating to the preparation, handling, and sale of any unpackaged food, or food packaged at the premises where it is sold to consumers, if the food is represented to be kosher, kosher for Passover, or prepared or maintained under rabbinical or other kosher supervision; and

(B) Complies with the provisions of subsections (b) through (e) of Code Section 10-1-393.11.

(17) "Marine membership" means any arrangement under which a purchaser has a right to use, occupy, or enjoy a marine membership facility.

(18) "Marine membership facility" means any boat, houseboat, yacht, ship, or other floating facility upon which the use, occupation, or enjoyment of the facility is primarily limited to those purchasers, along with their guests, who have purchased a right to make reservations at future times to use the facility or who have purchased a right to use periodically, occupy, or enjoy the facility at fixed times or intervals in the future, but shall not include any such arrangement which is regulated under Article 5 of Chapter 3 of Title 44.

(19) "Obligee" means a resident of this state who is identified in an order for child support issued by a court or other tribunal as the payee to whom an obligor owes child support.

(20) "Obligor" means a resident of this state who is identified in an order for child support issued by a court or other tribunal as required to make child support payments.

(21) "Office" means any place where business is transacted, where any service is supplied by any person, or where any farm is operated.

(22) "Office supplier" means any person who sells, rents, leases, or ships, or offers to sell, lease, rent, or ship, goods, services, or property to any person to be used in the operation of any office or of any farm.

(23) "Office supply transactions" means the sale, lease, rental, or shipment of, or offer to sell, lease, rent, or ship, goods, services, or property to any person to be used in the operation of any office or of any farm but shall not include transactions in which the goods, services, or property is purchased, leased, or rented by the office or farm for purposes of reselling them to other persons.

(24) "Person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity.

(24.1) "Presealed kosher food package" means a food package which bears a kosher symbol insignia and is sealed by the manufacturer, processor, or wholesaler at premises other than the premises where the food is to be sold to the public.

(25) "Private child support collector" means an individual or nongovernmental entity that solicits and contracts directly with obligees to provide child support collection services for a fee or other compensation but shall not include attorneys licensed to practice law in this state unless such attorney is employed by a private child support collector.

(26) "Prize" means a gift, award, or other item intended to be distributed or actually distributed in a promotion.

(27) "Promotion" means any scheme or procedure for the promotion of consumer transactions whereby one or more prizes are

distributed among persons who are required to be present at the place of business or are required to participate in a seminar, sales presentation, or any other presentation, by whatever name denominated, in order to receive the prize or to determine which, if any, prize they will receive. Promotions shall not include any procedure where the receipt of the prize is conditioned upon the purchase of the item which the seller is trying to promote if such condition is clearly and conspicuously disclosed in the promotional advertising and literature and the receipt of the prize does not involve an element of chance. Any procedure where the receipt of the prize is conditioned upon the purchase of the item which the seller is trying to promote or upon the payment of money and where the receipt of that prize involves an element of chance shall be deemed to be a lottery under Code Section 16-12-20; provided, however, that nothing in this definition shall be construed to include a lottery operated by the State of Georgia or the Georgia Lottery Corporation as authorized by law; provided, further, that any deposit made in connection with an activity described by subparagraph (b)(22)(B) of Code Section 10-1-393 shall not constitute the payment of money.

(27.1) "Representation regarding kosher food" means any direct or indirect statement, whether oral or written, including but not limited to an advertisement, sign, or menu and any letter, word, sign, emblem, insignia, or mark which could reasonably lead a consumer to believe that a representation is being made that the final food product sold to the consumer is kosher, kosher for Passover, or prepared or maintained under rabbinical or other kosher supervision.

(28) "Trade" and "commerce" mean the advertising, distribution, sale, lease, or offering for distribution, sale, or lease of any goods, services, or any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, or thing of value wherever situate and shall include any trade or commerce directly or indirectly affecting the people of this state.

(b) An "intentional violation" occurs when the person committing the act or practice knew that his or her conduct was in violation of this part. Maintenance of an act or practice specifically designated as unlawful in subsection (b) of Code Section 10-1-393 after the administrator gives notice that the act or practice is in violation of the part shall be prima-facie evidence of intentional violation. For the purposes of this subsection, the administrator gives notice that an act or practice is in violation of this part by the adoption of specific rules promulgated pursuant to subsection (a) of Code Section 10-1-394 and by notice in writing to the alleged violator of a violation, if such written notice may be reasonably given without substantially or materially altering the purposes of this part; provided, however, that no presumption of

intention shall arise in the case of an alleged violator who maintains a place of business within the jurisdiction of this state with sufficient assets to respond to a judgment under this part, unless such alleged violator has received written notice. The burden of showing no reasonable opportunity to give written notice shall be upon the administrator. (Ga. L. 1975, p. 376, § 2; Ga. L. 1978, p. 2001, § 1; Ga. L. 1982, p. 1689, §§ 1, 2A, 3; Ga. L. 1984, p. 22, § 10; Ga. L. 1985, p. 938, § 1; Ga. L. 1986, p. 405, § 1; Ga. L. 1986, p. 1046, § 1; Ga. L. 1986, p. 1313, § 1; Ga. L. 1987, p. 794, § 1; Ga. L. 1987, p. 1386, § 1; Ga. L. 1988, p. 13, § 10; Ga. L. 1989, p. 560, § 1; Ga. L. 1996, p. 1030, § 1; Ga. L. 1997, p. 143, § 10; Ga. L. 2001, p. 1245, § 1; Ga. L. 2009, p. 1001, § 2/HB 189; Ga. L. 2010, p. 114, § 3/HB 1345.)

The 2010 amendment, effective July 1, 2010, added paragraphs (a)(14.1), (a)(16.1), (a)(24.1) and (a)(27.1).

Editor's notes. — Ga. L. 2010, p. 114, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Kosher Food Consumer Protection Act.'"

10-1-393. Unfair or deceptive practices in consumer transactions unlawful; examples.

(a) Unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce are declared unlawful.

(b) By way of illustration only and without limiting the scope of subsection (a) of this Code section, the following practices are declared unlawful:

(1) Passing off goods or services as those of another;

(2) Causing actual confusion or actual misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) Causing actual confusion or actual misunderstanding as to affiliation, connection, or association with or certification by another;

(4)(A) Using deceptive representations or designations of geographic origin in connection with goods or services. Without limiting the generality of the foregoing, it is specifically declared to be unlawful:

(i) For any nonlocal business to cause to be listed in any local telephone directory a local telephone number for the business if calls to the local telephone number are routinely forwarded or otherwise transferred to the nonlocal business location that is outside the calling area covered by such local telephone directory or to a toll-free number which does not have a local address and the listing fails to state clearly the principal place of business of the nonlocal business;

(ii) For any person operating a business to cause to be listed in any local telephone directory a toll-free number for the business if the listing fails to state clearly the principal place of business of such business; or

(iii) For any person to use an assumed or fictitious name in the conduct of such person's business, if the use of such name could reasonably be construed to be a misrepresentation of the geographic origin or location of such person's business.

(B) For purposes of this paragraph, the term:

(i) "Local" or "local area" means the area in which any particular telephone directory is distributed or otherwise provided free of charge to some or all telecommunications services subscribers.

(ii) "Local telephone directory" means any telecommunications services directory, directory assistance data base, or other directory listing which is distributed or otherwise provided free of charge to some or all telecommunications services subscribers in any area of this state and includes such directories distributed by telecommunications companies as well as such directories distributed by other parties.

(iii) "Local telephone number" means any telecommunications services number which is not clearly identifiable as a long-distance telecommunications services number and which has a three-number prefix typically used by the local telecommunications company for telecommunications services devices physically located within the local area.

(iv) "Nonlocal business" means any business which does not have within the local area a physical place of business providing the goods or services which are the subject of the advertisement or listing in question.

(v) "Telecommunications company" shall have the same meaning as provided in Code Section 46-5-162.

(vi) "Telecommunications services" shall have the same meaning as provided in Code Section 46-5-162.

(vii) "Telecommunications services subscriber" means a person or entity to whom telecommunications services, either residential or commercial, are provided;

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;

(6) Representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;

(7) Representing that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another;

(8) Disparaging goods, services, or business of another by false or misleading representation;

(9) Advertising goods or services with intent not to sell them as advertised;

(10) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) Making false or misleading statements concerning the reasons for, existence of, or amounts of price reductions;

(12) Failing to comply with the provisions of Code Section 10-1-393.2 concerning health spas;

(13) Failure to comply with the following provisions concerning career consulting firms:

(A) A written contract shall be employed which shall constitute the entire agreement between the parties, a fully completed copy of which shall be furnished to the consumer at the time of its execution which shows the date of the transaction and the name and address of the career consulting firm;

(B) The contract or an attachment thereto shall contain a statement in boldface type which complies substantially with the following:

"The provisions of this agreement have been fully explained to me and I understand that the services to be provided under this agreement by the seller do not include actual job placement."

The statement shall be signed by both the consumer and the authorized representative of the seller;

(C) Any advertising offering the services of a career consulting firm shall contain a statement which contains the following language: "A career consulting firm does not guarantee actual job placement as one of its services.";

(14) Failure of a hospital or long-term care facility to deliver to an inpatient who has been discharged or to his or her legal representative, not later than six business days after the date of such discharge, an itemized statement of all charges for which the patient or third-party payor is being billed;

(15) Any violation of 49 U.S.C. Sections 32702 through 32704 and any violation of regulations prescribed under 49 U.S.C. Section 32705. Notwithstanding anything in this part to the contrary, all such actions in violation of such federal statutes or regulations shall be consumer transactions and consumer acts or practices in trade or commerce;

(16) Failure to comply with the following provisions concerning promotions:

(A) For purposes of this paragraph, the term:

(i) "Conspicuously," when referring to type size, means either a larger or bolder type than the adjacent and surrounding material.

(ii) "In conjunction with and in immediate proximity to," when referring to a listing of verifiable retail value and odds for each prize, means that such value and odds must be adjacent to that particular prize with no other printed or pictorial matter between the value and odds and that listed prize.

(iii) "Notice" means a communication of the disclosures required by this paragraph to be given to a consumer that has been selected, or has purportedly been selected, to participate in a promotion. If the original notice is in writing, it shall include all of the disclosures required by this paragraph. If the original notice is oral, it shall include all of the disclosures required by this paragraph and shall be followed by a written notice to the consumer of the same disclosures. In all cases, written notice shall be received by the consumer before any agreement or other arrangement is entered into which obligates the consumer in any manner.

(iv) "Participant" means a person who is offered an opportunity to participate in a promotion.

(v) "Promoter" means the person conducting the promotion.

(vi) "Sponsor" means the person on whose behalf the promotion is conducted in order to promote or advertise the goods, services, or property of that person.

(vii) "Verifiable retail value," when referring to a prize, means:

(I) The price at which the promoter or sponsor can substantiate that a substantial number of those prizes have been sold at retail by someone other than the promoter or sponsor; or

(II) In the event that substantiation as described in subdivision (I) of this division is not readily available to the

promoter or sponsor, no more than three times the amount which the promoter or sponsor has actually paid for the prize.

(A.1) Persons who are offered an opportunity to participate in a promotion must be given a notice as required by this paragraph. The written notice must be given to the participant either prior to the person's traveling to the place of business or, if no travel by the participant is necessary, prior to any seminar, sales presentation, or other presentation, by whatever name denominated. Written notices may be delivered by hand, by mail, by newspaper, or by periodical. Any offer to participate made through any other medium must be preceded by or followed by the required notice at the required time. It is the intent of this paragraph that full, clear, and meaningful disclosure shall be made to the participant in a manner such that the participant can fully study and understand the disclosure prior to deciding whether to travel to the place of participation or whether to allow a presentation to be made in the participant's home; and that this paragraph be liberally construed to effect this purpose. The notice requirements of this paragraph shall be applicable to any promotion offer made by any person in the State of Georgia or any promotion offer made to any person in the State of Georgia;

(B) The promotion must be an advertising and promotional undertaking, in good faith, solely for the purpose of advertising the goods, services, or property, real or personal, of the sponsor. The notice shall contain the name and address of the promoter and of the sponsor, as applicable. The promoter and the sponsor may be held liable for any failure to comply with the provisions of this paragraph;

(C) A promotion shall be a violation of this paragraph if a person is required to pay any money including, but not limited to, payments for service fees, mailing fees, or handling fees payable to the sponsor or seller or furnish any consideration for the prize, other than the consideration of traveling to the place of business or to the presentation or of allowing the presentation to be made in the participant's home, in order to receive any prize; provided, however, that the payment of any deposit made in connection with an activity described in subparagraph (B) of paragraph (22) of this subsection shall not constitute a requirement to pay any money under this subparagraph;

(D) Each notice must state the verifiable retail value of each prize which the participant has a chance of receiving. Each notice must state the odds of the participant's receiving each prize if there is an element of chance involved. The odds must be clearly identified as "odds." Odds must be stated as the total number of

that particular prize which will be given and of the total number of notices. The total number of notices shall include all notices in which that prize may be given, regardless of whether it includes notices for other sponsors. If the odds of winning a particular prize would not be accurately stated on the basis of the number of notices, then the odds may be stated in another manner, but must be clearly stated in a manner which will not deceive or mislead the participant regarding the participant's chance of receiving the prize. The verifiable retail value and odds for each prize must be stated in conjunction and in immediate proximity with each listing of the prize in each place where it appears on the written notice and must be listed in the same size type and same boldness as the prize. Odds and verifiable retail values may not be listed in any manner which requires the participant to refer from one place in the written notice to another place in the written notice to determine the odds and verifiable retail value of the particular prize. Verifiable retail values shall be stated in Arabic numerals;

(E) Upon arriving at the place of business or upon allowing the sponsor to enter the participant's home, the participant must be immediately informed which, if any, prize the participant will receive prior to any seminar, sales presentation, or other presentation; and the prize, or any voucher, certificate, or other evidence of obligation in lieu of the prize, must be given to the participant at the time the participant is so informed;

(F) No participant shall be required or invited to view, hear, or attend any sales presentation, by whatever name denominated, unless such requirement or invitation has been conspicuously disclosed to the participant in the written notice in at least ten-point boldface type;

(G) Except in relation to an activity described in subparagraph (B) of paragraph (22) of this subsection, in no event shall any prize be offered or given which will require the participant to purchase additional goods or services, including shipping fees, handling fees, or any other charge by whatever name denominated, from any person in order to make the prize conform to what it reasonably appears to be in the mailing or delivery, unless such requirement and the additional cost to the participant is clearly disclosed in each place where the prize is listed in the written notice using a statement in the same size type and boldness as the prize listed;

(H) Any limitation on eligibility of participants must be clearly disclosed in the notice;

(I) Substitutes of prizes shall not be made. In the event the represented prize is unavailable, the participant shall be presented

with a certificate which the sponsor shall honor within 30 days by shipping the prize, as represented in the notice, to the participant at no cost to the participant. In the event a certificate cannot be honored within 30 days, the sponsor shall mail to the participant a valid check or money order for the verifiable retail value which was represented in the notice;

(J) In the event the participant is presented with a voucher, certificate, or other evidence of obligation as the participant's prize, or in lieu of the participant's prize, it shall be the responsibility of the sponsor to honor the voucher, certificate, or other evidence of obligation, as represented in the notice, if the person who is named as being responsible for honoring the voucher, certificate, or other evidence of obligation fails to honor it as represented in the notice;

(K) The geographic area covered by the notice must be clearly stated. If any of the prizes may be awarded to persons outside of the listed geographical area or to participants in promotions for other sponsors, these facts must be clearly stated, with a corresponding explanation that every prize may not be given away by that particular sponsor. If prizes will not be awarded or given if the winning ticket, token, number, lot, or other device used to determine winners in that particular promotion is not presented to the promoter or sponsor, this fact must be clearly disclosed;

(L) Upon request of the administrator, the sponsor or promoter must within ten days furnish to the administrator the names, addresses, and telephone numbers of persons who have received any prize;

(M) A list of all winning tickets, tokens, numbers, lots, or other devices used to determine winners in promotions involving an element of chance must be prominently posted at the place of business or distributed to all participants if the seminar, sales presentation, or other presentation is made at a place other than the place of business. A copy of such list shall be furnished to each participant who so requests;

(N) Any promotion involving an element of chance which does not conform with the provisions of this paragraph shall be considered an unlawful lottery as defined in Code Section 16-12-20. Except as provided in Code Section 16-12-35 and Chapter 17 of Title 48, any promotion involving an element of chance which involves the playing of a game on a computer, mechanical device, or electronic device at a place of business in this state shall be considered an unlawful lottery as defined in Code Section 16-12-20 and shall not be permitted under this chapter. Any promotion involving the playing of a no-skill game on a computer, mechanical

device, or electronic device at a place of business in this state shall be considered an unlawful lottery as defined in Code Section 16-12-20. The administrator may seek and shall receive the assistance of the prosecuting attorneys of this state in the commencement and prosecution of persons who promote and sponsor promotions which constitute an unlawful lottery;

(N.1) All prizes offered and awarded shall be noncash prizes only and shall not be redeemable for cash;

(O) Any person who participates in a promotion and does not receive an item which conforms with what that person, exercising ordinary diligence, reasonably believed that person should have received based upon the representations made to that person may bring the private action provided for in Code Section 10-1-399 and, if that person prevails, shall be awarded, in addition to any other recovery provided under this part, a sum which will allow that person to purchase an item at retail which reasonably conforms to the prize which that person, exercising ordinary diligence, reasonably believed that person would receive; and

(P) In addition to any other remedy provided under this part, where a contract is entered into while participating in a promotion which does not conform with this paragraph, the contract shall be voidable by the participant for ten business days following the date of the participant's receipt of the prize. In order to void the contract, the participant must notify the sponsor in writing within ten business days following the participant's receipt of the prize;

(17) Failure to furnish to the buyer of any campground membership or marine membership at the time of purchase a notice to the buyer allowing the buyer seven days to cancel the purchase. The notice shall be on a separate sheet of paper with no other written or pictorial material, in at least ten-point boldface type, double spaced, and shall read as follows:

"Notice to the Buyer

Please read this form completely and carefully. It contains valuable cancellation rights.

The buyer or buyers may cancel this transaction at any time prior to 5:00 P.M. of the seventh day following receipt of this notice.

This cancellation right cannot be waived in any manner by the buyer or buyers.

Any money paid by the buyer or buyers must be returned by the seller within 30 days of cancellation.

To cancel, sign this form, and mail by certified mail or statutory overnight delivery, return receipt requested, by 5:00 P.M. of the

seventh day following the transaction. Be sure to keep a photocopy of the signed form and your post office receipt.

Seller's Name

Address to which cancellation is to be mailed

I (we) hereby cancel this transaction.

Buyer's Signature

Buyer's Signature

Date

Printed Name(s) of Buyer(s)

Street Address

City, State, ZIP Code"

(18) Failure of the seller of a campground membership or marine membership to fill in the seller's name and the address to which cancellation notices should be mailed on the form specified in paragraph (17) of this subsection;

(19) Failure of the seller of a campground membership or marine membership to cancel according to the terms specified in the form described in paragraph (17) of this subsection;

(20)(A) Representing that moneys provided to or on behalf of a debtor, as defined in Code Section 44-14-162.1 in connection with property used as a dwelling place by said debtor, are a loan if in fact they are used to purchase said property and any such misrepresentation upon which is based the execution of a quitclaim deed or warranty deed by that debtor shall authorize that debtor to bring an action to reform such deed into a deed to secure debt in addition to any other right such debtor may have to cancel the deed

pursuant to Code Section 23-2-2, 23-2-60, or any other applicable provision of law.

(B) Advertising to assist debtors whose loan for property the debtors use as a dwelling place is in default with intent not to assist them as advertised or making false or misleading representations to such a debtor about assisting the debtor in connection with said property.

(C) Failing to comply with the following provisions in connection with the purchase of property used as a dwelling place by a debtor whose loan for said property is in default and who remains in possession of this property after said purchase:

(i) A written contract shall be employed by the buyer which shall summarize and incorporate the entire agreement between the parties, a fully completed copy of which shall be furnished to the debtor at the time of its execution. Said contract shall show the date of the transaction and the name and address of the parties; shall state, in plain and bold language, that the subject transaction is a sale; and shall indicate the amount of cash proceeds and the amount of any other financial benefits that the debtor will receive;

(ii) This contract shall contain a statement in boldface type which complies substantially with the following:

"The provisions of this agreement have been fully explained to me. I understand that under this agreement I am selling my house to the other undersigned party."

This statement shall be signed by the debtor and the buyer;

(iii) If a lease or rental agreement is executed in connection with said sale, it shall set forth the amount of monthly rent and shall state, in plain and bold language, that the debtor may be evicted for failure to pay said rent. Should an option to purchase be included in this lease, it shall state, in plain and bold language, the conditions that must be fulfilled in order to exercise it; and

(iv) The buyer shall furnish to the seller at the time of closing a notice to the seller allowing the seller ten days to cancel the purchase. This right to cancel shall not limit or otherwise affect the seller's right to cancel pursuant to Code Section 23-2-2, 23-2-60, or any other applicable provision of law. The notice shall serve as the cover sheet to the closing documents. It shall be on a separate sheet of paper with no other written or pictorial material, in at least ten-point boldface type, double spaced, and shall read as follows:

"Notice to the Seller

Please read this form completely and carefully. It contains valuable cancellation rights.

The seller or sellers may cancel this transaction at any time prior to 5:00 P.M. of the tenth day following receipt of this notice.

This cancellation right cannot be waived in any manner by the seller or sellers.

Any money paid to the seller or sellers must be returned by the seller within 30 days of cancellation.

To cancel, sign this form, and return it to the buyer by 5:00 P.M. of the tenth day following the transaction. It is best to mail it by certified mail or statutory overnight delivery, return receipt requested, and to keep a photocopy of the signed form and your post office receipt.

Buyer's Name

Address to which cancellation

is to be returned

I (we) hereby cancel this transaction.

Seller's Signature

Seller's Signature

Date

Printed Name(s) of Seller(s)

Street Address

City, State, ZIP Code"

(D) The provisions of subparagraph (C) of this paragraph shall only apply where all three of the following conditions are present:

(i) A loan on the property used as a dwelling place is in default;

(ii) The debtor transfers the title to the property by quitclaim deed, limited warranty deed, or general warranty deed; and

(iii) The debtor remains in possession of the property under a lease or as a tenant at will;

(21) Advertising a telephone number the prefix of which is 976 and which when called automatically imposes a per-call charge or cost to the consumer, other than a regular charge imposed for long-distance telephone service, unless the advertisement contains the name, address, and telephone number of the person responsible for the advertisement and unless the person's telephone number and the per-call charge is printed in type of the same size as that of the number being advertised;

(22) Representing, in connection with a vacation, holiday, or an item described by terms of similar meaning, or implying that:

(A) A person is a winner, has been selected or approved, or is in any other manner involved in a select or special group for receipt of an opportunity or prize, or that a person is entering a contest, sweepstakes, drawing, or other competitive enterprise from which a winner or select group will receive an opportunity or prize, when in fact the enterprise is designed to make contact with prospective customers, or in which all or a substantial number of those entering such competitive enterprise receive the same prize or opportunity; or

(B) In connection with the types of representations referred to in subparagraph (A) of this paragraph, representing that a vacation, holiday, or an item described by other terms of similar meaning, is being offered, given, awarded, or otherwise distributed unless:

(i) The item represented includes all transportation, meals, and lodging;

(ii) The representation specifically describes any transportation, meals, or lodging which is not included; or

(iii) The representation discloses that a deposit is required to secure a reservation, if that is the case.

The provisions of this paragraph shall not apply where the party making the representations is in compliance with paragraph (16) of this subsection;

(23) Except in relation to an activity which is in compliance with paragraph (16) or (22) of this subsection, stating, in writing or by telephone, that a person has won, is the winner of, or will win or receive anything of value, unless the person will receive the prize without obligation;

(24)(A) Conducting a going-out-of-business sale for more than 90 days.

(B) After the 90 day time limit in subparagraph (A) of this paragraph has expired, continuing to do business in any manner contrary to any representations which were made regarding the nature of the going-out-of-business sale.

(C) The prohibitions of this paragraph shall not extend to any of the following:

(i) Sales for the estate of a decedent by the personal representative or the personal representative's agent, according to law or by the provisions of the will;

(ii) Sales of property conveyed by security deed, deed of trust, mortgage, or judgment or ordered to be sold according to the deed, mortgage, judgment, or order;

(iii) Sales of all agricultural produce and livestock arising from the labor of the seller or other labor under the seller's control on or belonging to the seller's real or personal estate and not purchased or sold for speculation;

(iv) All sales under legal process;

(v) Sales by a pawnbroker or loan company which is selling or offering for sale unredeemed pledges of chattels as provided by law; or

(vi) Sales of automobiles by an auctioneer licensed under the laws of the State of Georgia;

(25) The issuance of a check or draft by a lender in connection with a real estate transaction in violation of Code Section 44-14-13;

(26) With respect to any individual or facility providing personal care services or assisted living care:

(A) Any person or entity not duly licensed or registered as a personal care home or assisted living community formally or informally offering, advertising to, or soliciting the public for residents or referrals; or

(B) Any personal care home, as defined in subsection (a) of Code Section 31-7-12, or any assisted living community, as defined in Code Section 31-7-12.2, offering, advertising, or soliciting the public to provide services:

(i) Which are outside the scope of personal care services or assisted living care, respectively; and

(ii) For which it has not been specifically authorized.

Nothing in this subparagraph prohibits advertising by a personal care home or assisted living community for services authorized by

the Department of Community Health under a waiver or variance pursuant to subsection (b) of Code Section 31-2-7.

For purposes of this paragraph, "personal care" means protective care and watchful oversight of a resident who needs a watchful environment but who does not have an illness, injury, or disability which requires chronic or convalescent care including medical and nursing services, and "assisted living care" includes services provided for in Code Section 31-7-12.2. The provisions of this paragraph shall be enforced following consultation with the Department of Community Health which shall retain primary responsibility for issues relating to licensure of any individual or facility providing personal care services;

(27) Mailing any notice, notification, or similar statement to any consumer regarding winning or receiving any prize in a promotion, and the envelope or other enclosure for the notice fails to conspicuously identify on its face that the contents of the envelope or other enclosure is a commercial solicitation and, if there is an element of chance in winning a prize, the odds of winning as "odds";

(28) Any violation of the rules and regulations promulgated by the Department of Driver Services pursuant to subsection (e) of Code Section 40-5-83 which relates to the consumer transactions and business practices of DUI Alcohol or Drug Use Risk Reduction Programs, except that the Department of Driver Services shall retain primary jurisdiction over such complaints;

(29) With respect to any consumer reporting agency:

(A) Any person who knowingly and willfully obtains information relative to a consumer from a consumer reporting agency under false pretenses shall be guilty of a misdemeanor;

(B) Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be guilty of a misdemeanor; and

(C) Each consumer reporting agency which compiles and maintains files on consumers on a nation-wide basis shall furnish to any consumer who has provided appropriate verification of his or her identity two complete consumer reports per calendar year, upon request and without charge;

(29.1) With respect to any credit card issuer:

(A) A credit card issuer who mails an unsolicited offer or solicitation to apply for a credit card and who receives by mail a completed application in response to the solicitation which lists an

address that is not substantially the same as the address on the solicitation may not issue a credit card based on that application until steps have been taken to verify the applicant's valid address to the same extent required by regulations prescribed pursuant to subsection (l) of 31 U.S.C. Section 5318. Any person who violates this paragraph commits an unlawful practice within the meaning of this Code section; and

(B) Notwithstanding subparagraph (A) of this paragraph, a credit card issuer, upon receiving an application, may issue a credit card to a consumer or commercial customer with whom it already has a business relationship provided the address to which the card is mailed is a valid address based upon information in the records of the credit card issuer or its affiliates;

(30) With respect to any individual or facility providing home health services:

(A) For any person or entity not duly licensed by the Department of Community Health as a home health agency to regularly hold itself out as a home health agency; or

(B) For any person or entity not duly licensed by the Department of Community Health as a home health agency to utilize the words "home health" or "home health services" in any manner including but not limited to advertisements, brochures, or letters. Unless otherwise prohibited by law, nothing in this subparagraph shall be construed to prohibit persons or entities from using the words "home health" or "home health services" in conjunction with the words "equipment," "durable medical equipment," "pharmacy," "pharmaceutical services," "prescription medications," "infusion therapy," or "supplies" in any manner including but not limited to advertisements, brochures, or letters. An unlicensed person or entity may advertise under the category "home health services" in any advertising publication which divides its advertisements into categories, provided that:

(i) The advertisement is not placed in the category with the intent to mislead or deceive;

(ii) The use of the advertisement in the category is not part of an unfair or deceptive practice; and

(iii) The advertisement is not otherwise unfair, deceptive, or misleading.

For purposes of this paragraph, the term "home health agency" shall have the same definition as contained in Code Section 31-7-150, as now or hereafter amended. The provisions of this paragraph shall be enforced by the administrator in consultation with the Department of

Community Health; provided, however, that the administrator shall not have any responsibility for matters or functions related to the licensure of home health agencies;

(30.1) Failing to comply with the following provisions in connection with a contract for health care services between a physician and an insurer which offers a health benefit plan under which such physician provides health care services to enrollees:

(A) As used in this paragraph, the term:

(i) "Enrollee" means an individual who has elected to contract for or participate in a health benefit plan for that individual or for that individual and that individual's eligible dependents and includes that enrollee's eligible dependents.

(ii) "Health benefit plan" means any hospital or medical insurance policy or certificate, health care plan contract or certificate, qualified higher deductible health plan, health maintenance organization subscriber contract, any health benefit plan established pursuant to Article 1 of Chapter 18 of Title 45, or any managed care plan.

(iii) "Insurer" means a corporation or other entity which is licensed or otherwise authorized to offer a health benefit plan in this state.

(iv) "Patient" means a person who seeks or receives health care services under a health benefit plan.

(v) "Physician" means a person licensed to practice medicine under Article 2 of Chapter 34 of Title 43.

(B) Every contract between a physician and an insurer which offers a health benefit plan under which that physician provides health care services shall be in writing and shall state the obligations of the parties with respect to charges and fees for services covered under that plan when provided by that physician to enrollees under that plan. Neither the insurer which provides that plan nor the enrollee under that plan shall be liable for any amount which exceeds the obligations so established for such covered services.

(C) Neither the physician nor a representative thereof shall intentionally collect or attempt to collect from an enrollee any obligations with respect to charges and fees for which the enrollee is not liable and neither such physician nor a representative thereof may maintain any action at law against such enrollee to collect any such obligations.

(D) The provisions of this paragraph shall not apply to the amount of any deductible or copayment which is not covered by the health benefit plan.

(E) This paragraph shall apply to only such health benefit plan contracts issued, delivered, issued for delivery, or renewed in this state on or after July 2, 2001;

(31) With respect to telemarketing sales:

(A) For any seller or telemarketer to use any part of an electronic record to attempt to induce payment or attempt collection of any payment that the seller or telemarketer claims is due and owing to it pursuant to a telephone conversation or series of telephone conversations with a residential subscriber. Nothing in this paragraph shall be construed to:

(i) Prohibit the seller or telemarketer from introducing, as evidence in any court proceeding to attempt collection of any payment that the seller or telemarketer claims is due and owing to it pursuant to a telephone conversation or series of telephone conversations with a residential subscriber, an electronic record of the entirety of such telephone conversation or series of telephone conversations; or

(ii) Expand the permissible use of an electronic record made pursuant to 16 C.F.R. Part 310.3(a)(3), the Federal Telemarketing Sales Rule.

(B) For purposes of this paragraph, the term:

(i) "Covered communication" means any unsolicited telephone call or telephone call arising from an unsolicited telephone call.

(ii) "Electronic record" means any recording by electronic device of, in part or in its entirety, a telephone conversation or series of telephone conversations with a residential subscriber that is initiated by a seller or telemarketer in order to induce the purchase of goods, services, or property. This term shall include, without limitation, any subsequent telephone conversations in which the seller or telemarketer attempts to verify any alleged agreement in a previous conversation or previous conversations.

(iii) "Residential subscriber" means any person who has subscribed to residential phone service from a local exchange company or the other persons living or residing with such person.

(iv) "Seller or telemarketer" means any person or entity making a covered communication to a residential subscriber for the purpose of inducing the purchase of goods, services, or property by such subscriber. This term shall include, without limitation,

any agent of the seller or telemarketer, whether for purposes of conducting calls to induce the purchase, for purposes of verifying any calls to induce the purchase, or for purposes of attempting to collect on any payment under the purchase;

(32) Selling, marketing, promoting, advertising, providing, or distributing any card or other purchasing mechanism or device that is not insurance or evidence of insurance coverage and that purports to offer or provide discounts or access to discounts on purchases of health care goods or services from providers of the same or making any representation or statement that purports to offer or provide discounts or access to discounts on purchases of health care goods or services from providers of the same, when:

(A) Such card or other purchasing mechanism or device does not contain a notice expressly and prominently providing in boldface type that such discounts are not insurance; or

(B) Such discounts or access to such discounts are not specifically authorized under a separate contract with a provider of health care goods or services to which such discounts are purported to be applicable;

(33)(A) For any person, firm, partnership, association, or corporation to issue a gift certificate, store gift card, or general use gift card without:

(i) Including the terms of the gift certificate, store gift card, or general use gift card in the packaging which accompanies the certificate or card at the time of purchase, as well as making such terms available upon request; and

(ii) Conspicuously printing the expiration date, if applicable, on the certificate or card and conspicuously printing the amount of any dormancy or nonuse fees on:

(I) The certificate or card; or

(II) A sticker affixed to the certificate or card.

A gift certificate, store gift card, or general use gift card shall be valid in accordance with its terms in exchange for merchandise or services.

(B) As used in this paragraph, the term:

(i) "General use gift card" means a plastic card or other electronic payment device which is usable at multiple, unaffiliated merchants or service providers; is issued in an amount which amount may or may not be, at the option of the issuer, increased in value or reloaded if requested by the holder; is

purchased or loaded on a prepaid basis by a consumer; and is honored upon presentation by merchants for goods or services.

(ii) "Gift certificate" means a written promise that is usable at a single merchant or an affiliated group of merchants that share the same name, mark, or logo; is issued in a specified amount and cannot be increased in value on the face thereof; is purchased on a prepaid basis by a consumer in exchange for payment; and is honored upon presentation for goods or services by such single merchant or affiliated group of merchants that share the same name, mark, or logo.

(iii) "Store gift card" means a plastic card or other electronic payment device which is usable at a single merchant or an affiliated group of merchants that share the same name, mark, or logo; is issued in a specified amount and may or may not be increased in value or reloaded; is purchased on a prepaid basis by a consumer in exchange for payment; and is honored upon presentation for goods or services by such single merchant or affiliated group of merchants that share the same name, mark, or logo; and

(34) For any person, firm, partnership, business, association, or corporation to willfully and knowingly accept or use an individual taxpayer identification number issued by the Internal Revenue Service for fraudulent purposes and in violation of federal law.

(c) A seller may not by contract, agreement, or otherwise limit the operation of this part notwithstanding any other provision of law.

(d)(1) Notwithstanding any other provision of the law to the contrary, the names, addresses, telephone numbers, social security numbers, or any other information which could reasonably serve to identify any person making a complaint about unfair or deceptive acts or practices shall be confidential. However, the complaining party may consent to public release of his or her identity by giving such consent expressly, affirmatively, and directly to the administrator or administrator's employees.

(2) Nothing contained in this subsection shall be construed:

(A) To prevent the administrator from disclosing the complainant's identity if the administrator believes that disclosure will aid in resolution of the complaint;

(B) To prohibit any valid discovery under the relevant discovery rules; or

(C) To prohibit the lawful subpoena of such information. (Ga. L. 1975, p. 376, § 3; Ga. L. 1978, p. 2001, § 2; Ga. L. 1982, p. 3, § 10;

Ga. L. 1982, p. 1689, §§ 2, 4; Ga. L. 1983, p. 1298, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1984, p. 463, § 1; Ga. L. 1985, p. 149, § 10; Ga. L. 1985, p. 938, § 2; Ga. L. 1985, p. 1183, § 1; Ga. L. 1986, p. 405, § 2; Ga. L. 1986, p. 1313, § 2; Ga. L. 1987, p. 794, § 2; Ga. L. 1987, p. 1386, § 2; Ga. L. 1988, p. 13, § 10; Ga. L. 1988, p. 399, §§ 1-3; Ga. L. 1988, p. 983, § 1; Ga. L. 1988, p. 1657, § 1; Ga. L. 1989, p. 14, § 10; Ga. L. 1989, p. 560, § 3; Ga. L. 1989, p. 1606, § 1; Ga. L. 1990, p. 1653, § 2; Ga. L. 1991, p. 94, § 10; Ga. L. 1992, p. 1129, § 1; Ga. L. 1992, p. 2139, § 1; Ga. L. 1993, p. 91, § 10; Ga. L. 1993, p. 1076, §§ 1, 2; Ga. L. 1993, p. 1676, § 1; Ga. L. 1995, p. 729, § 1; Ga. L. 1996, p. 1030, § 1; Ga. L. 1997, p. 143, § 10; Ga. L. 1997, p. 1507, § 1; Ga. L. 1998, p. 643, § 1; Ga. L. 2000, p. 557, § 1; Ga. L. 2000, p. 1181, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 4, § 10; Ga. L. 2001, p. 1170, § 2; Ga. L. 2004, p. 149, § 1; Ga. L. 2005, p. 334, § 4-2/HB 501; Ga. L. 2005, p. 1183, § 2/SB 13; Ga. L. 2009, p. 86, § 18/HB 141; Ga. L. 2009, p. 453, §§ 1-4, 1-11/HB 228; Ga. L. 2010, p. 302, § 1/SB 368; Ga. L. 2011, p. 227, § 2/SB 178; Ga. L. 2011, p. 705, § 4-6/HB 214; Ga. L. 2012, p. 1136, § 1/SB 431.)

The 2010 amendment, effective January 1, 2011, rewrote paragraph (b)(4) and subsection (d).

The 2011 amendments. — The first 2011 amendment, effective July 1, 2011, in paragraph (b)(26), inserted "or assisted living care" and "assisted living community" throughout; in subparagraph (b)(26)(A), added "or" at the end; in subparagraph (b)(26)(B), inserted ", as defined in Code Section 31-7-12.2," in the introductory language, and in division (i), inserted ", respectively"; and, in the last paragraph, substituted a period for a semicolon at the end of the first sentence, deleted the subparagraph (C) designation, and added ", and 'assisted living care' includes services provided for in Code Section 31-7-12.2" at the end of the second sentence. The second 2011 amendment, effective July 1, 2011, substituted "Code Section 31-2-7" for "Code Section 31-2-9" at the end of the undesignated language of subparagraph (b)(26)(B).

The 2012 amendment, effective May 2, 2012, inserted the second and third sentences in subparagraph (b)(16)(N); and added subparagraph (b)(16)(N.1). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 1136, § 4/SB 431, not codified by the General Assembly, provides in part that this Code section shall apply to conduct that occurs on and after May 2, 2012. It is not the intention of this Act to abate any prosecution undertaken for conduct occurring under the law in effect prior to such date, and any offense committed before May 2, 2012, shall be prosecuted and punished under the statutes in effect at the time the offense was committed.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 147 (2011).

For comment, "Unwrapping Escheat: Unclaimed Property Laws and Gift Cards," see 60 Emory L. J. 971 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration
Automobiles
Trademarks, Names

General Consideration

Part applied to banks.

Borrower failed on summary judgment to state a claim against two banks under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the borrower presented no evidence that the application of funds to an escrow account was improper, that any unfair business practice existed, or that any damages were suffered under O.C.G.A. § 10-1-393 of the Act. Cornelius v. Home Comings Fin. Network, Inc., No. 08-11044, 2008 U.S. App. LEXIS 19745 (11th Cir. Sept. 16, 2008) (Unpublished).

Application to dentists. — Patient's suit against a dentist, alleging the dentist failed to disclose treatment alternatives and associated risks prior to commencing dental work, did not establish a violation of Georgia's Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., as there was no evidence showing that this omission resulted in the patient's damages as required by the FBPA. Tookes v. Murray, 297 Ga. App. 765, 678 S.E.2d 209 (2009).

Parole evidence could not contradict written agreement in patient's claim. — Patient's claim that a dentist violated Georgia's Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., was based on an allegation that a member of the dentist's staff told the patient that a loan for dental work would be at a lower interest rate than that stated in the financing authorization. The claim failed as such parol evidence was inadmissible to contradict the clear written provisions of the authorization, which the patient signed, and the promissory note referenced therein. Tookes v. Murray, 297 Ga. App. 765, 678 S.E.2d 209 (2009).

Consumer's remedies in satellite transaction. — Motion to compel arbitration of a putative class action was improperly denied under 9 U.S.C. §§ 2 and 16 because it was not unconscionable to require arbitration of the validity of an early cancellation fee charged by a satellite television provider in that the subscriber had the ability to recoup fees and expenses under the Georgia Fair Business Practices Act under O.C.G.A. §§ 10-1-393 and 10-1-399 if the subscriber prevailed individually. Cappuccitti v. DirecTV, Inc., 623 F.3d 1118 (11th Cir. 2010).

Incentive fund cards. — Licensors of an incentive funds card that was marketed and sold by a charter jet company were not liable to a purchaser who bought an incentive funds card from the jet company under the Fair Business Practices Act because the licensors made no statements verbally or in writing to the purchaser prior to the purchaser's signing the incentive card purchase agreement. Williams v. Jet One Jets, Inc., 755 F. Supp. 2d 1281 (N.D. Ga. Nov. 19, 2010).

Statute of limitations. — Because plaintiff dry cleaners sued defendant natural gas supplier 33 months after the alleged misdeeds, and it was not alleged that any Georgia Public Service Commission proceedings had been initiated that would have postponed the accrual date, the O.C.G.A. § 10-1-393(a) claim was time-barred by O.C.G.A. § 10-1-401(a)'s two-year limitations period. Byung Ho Cheoun v. Infinite Energy, Inc., No. 09-13902, 2010 U.S. App. LEXIS 1866 (11th Cir. Jan. 27, 2010) (Unpublished).

Automobiles

Arbitration agreement enforceable. — Car buyer's claim against a lender's assignee under the Fair Business Practices Act could be compelled to arbitration pursuant to an agreement signed by the buyer. O.C.G.A. § 10-1-393(c) was preempted by the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., to the extent it conflicted with the FAA. Wells Fargo Auto Fin., Inc. v. Wright, 304 Ga. App. 621, 698 S.E.2d 17 (2010).

Trademarks, Names

Use of trade names. — Buyers' claim that the buyers were confused by the use of trade names belied the record because one buyer testified that the buyer knew exactly who the buyer was dealing with. Isbell v. Credit Nation Lending Serv., LLC, 319 Ga. App. 19, 735 S.E.2d 46 (2012).

10-1-393.2. Requirements for health spas.

RESEARCH REFERENCES

ALR. — Construction and applicability of state statutes governing health club membership contracts or fees, 48 ALR6th 223.

10-1-393.4. Pricing practices during state of emergency.

(a) It shall be an unlawful, unfair, and deceptive trade practice for any person, firm, or corporation doing business in any area in which a state of emergency, as such term is defined in Code Section 38-3-3, has been declared, for so long as such state of emergency exists, to sell or offer for sale at retail any goods or services identified by the Governor in the declaration of the state of emergency necessary to preserve, protect, or sustain the life, health, or safety of persons or their property at a price higher than the price at which such goods were sold or offered for sale immediately prior to the declaration of a state of emergency; provided, however, that such price may be increased only in an amount which accurately reflects an increase in cost of the goods or services to the person selling the goods or services or an increase in the cost of transporting the goods or services into the area.

(b) Notwithstanding the provisions of subsection (a) of this Code section, a retailer may increase the price of goods or services during a state of emergency if the price charged for those goods or services is no greater than the cost to the retailer of those goods or services, plus the retailer's average markup percentage applied during the ten days immediately prior to the declaration of a state of emergency. (Code 1981, § 10-1-393.4, enacted by Ga. L. 1995, p. 1362, § 1; Ga. L. 2010, p. 213, § 1/SB 237.)

The 2010 amendment, effective May 20, 2010, in the middle of subsection (a), substituted "so long as" for "as long as" and inserted "identified by the Governor in the declaration of the state of emergency"; and rewrote subsection (b).

10-1-393.5. Prohibited telemarketing, Internet activities, or home repair.

(a) For purposes of this Code section, the term "telemarketing" shall have the same meaning which it has under 16 Code of Federal Regulations Part 310, the Telemarketing Sales Rule of the Federal Trade Commission, except that the term "telemarketing" shall also include those calls made in intrastate as well as interstate commerce.

(b) Without otherwise limiting the definition of unfair and deceptive acts or practices under this part, it shall be unlawful for any person who is engaged in telemarketing, any person who is engaged in any activity

involving or using a computer or computer network, or any person who is engaged in home repair work or home improvement work to:

(1) Employ any device, scheme, or artifice to defraud a person, organization, or entity;

(2) Engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon a person, organization, or entity; or

(3) Commit any offense involving theft under Code Sections 16-8-2 through 16-8-9.

(b.1)(1) As used in this subsection, the term:

(A) "Photograph" means a photograph of a subject individual that was taken in this state by an arresting law enforcement agency.

(B) "Subject individual" means an individual who was arrested and had his or her photograph taken and:

(i) Access to his or her case or charges was restricted pursuant to Code Section 35-3-37;

(ii) Prior to indictment, accusation, or other charging instrument, his or her case was never referred for further prosecution to the proper prosecuting attorney by the arresting law enforcement agency and the offense against such individual was closed by the arresting law enforcement agency;

(iii) Prior to indictment, accusation, or other charging instrument, the statute of limitations expired;

(iv) Prior to indictment, accusation, or other charging instrument, his or her case was referred to the prosecuting attorney but was later dismissed;

(v) Prior to indictment, accusation, or other charging instrument, the grand jury returned two no bills;

(vi) After indictment or accusation, all charges were dismissed or nolle prossed;

(vii) After indictment or accusation, the individual pleaded guilty to or was found guilty of possession of a narcotic drug, marijuana, or stimulant, depressant, or hallucinogenic drug and was sentenced in accordance with the provisions of Code Section 16-13-2, and the individual successfully completed the terms and conditions of his or her probation; or

(viii) The individual was acquitted of all of the charges by a judge or jury.

(2) Any person who is engaged in any activity involving or using a computer or computer network who publishes on such person's publicly available website a subject individual's arrest booking photograph for purposes of commerce shall be deemed to be transacting business in this state. Within 30 days of the sending of a written request by a subject individual, including his or her name, date of birth, date of arrest, and the name of the arresting law enforcement agency, such person shall, without fee or compensation, remove from such person's website the subject individual's arrest booking photograph. Such written request shall be transmitted via certified mail, return receipt requested, or statutory overnight delivery, to the registered agent, principal place of business, or primary residence of the person who published the website. Without otherwise limiting the definition of unfair and deceptive acts or practices under this part, a failure to comply with this paragraph shall be unlawful.

(c) In addition to any civil penalties under this part, any person who intentionally violates subsection (b) of this Code section shall be subject to a criminal penalty under paragraph (5) of subsection (a) of Code Section 16-8-12. In addition thereto, if the violator is a corporation, each of its officers and directors may be subjected to a like penalty; if the violator is a sole proprietorship, the owner thereof may be subjected to a like penalty; and, if the violator is a partnership, each of the partners may be subjected to a like penalty, provided that no person shall be subjected to a like penalty if the person did not have prior actual knowledge of the acts violating subsection (b) of this Code section.

(d) Any person who intentionally targets an elder or disabled person, as defined in Article 31 of this chapter, in a violation of subsection (b) of this Code section shall be subject to an additional civil penalty, as provided in Code Section 10-1-851.

(e) Persons employed full time or part time for the purpose of conducting potentially criminal investigations under this article shall be certified peace officers and shall have all the powers of a certified peace officer of this state when engaged in the enforcement of this article, including but not limited to the power to obtain, serve, and execute search warrants. Such Georgia certified peace officers shall be subject to the requirements of Chapter 8 of Title 35, the "Georgia Peace Officer Standards and Training Act," and are specifically required to complete the training required for peace officers by that chapter. Such certified peace officers shall be authorized, upon completion of the required training, with the written approval of the administrator, and notwithstanding Code Sections 16-11-126 and 16-11-129, to carry firearms of a standard police issue when engaged in detecting, investigating, or preventing crimes under this article.

(f) The administrator shall be authorized to promulgate procedural rules relating to his or her enforcement duties under this Code section. (Code 1981, § 10-1-393.5, enacted by Ga. L. 1996, p. 231, § 1; Ga. L. 1997, p. 1507, § 2; Ga. L. 2004, p. 631, § 10; Ga. L. 2010, p. 963, § 2-1/SB 308; Ga. L. 2013, p. 613, § 1/HB 150.)

The 2010 amendment, effective June 4, 2010, deleted ", 16-11-128," preceding "and 16-11-129" in the middle of the last sentence of subsection (e). See the editor's note for applicability.

The 2013 amendment, effective May 6, 2013, added subsection (b.1).

Editor's notes. — Ga. L. 2010, p. 963, § 3-1, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on and after June 4, 2010, and shall not affect any prosecutions for acts occurring before June 4, 2010, and shall not act as an abatement of any such prosecution.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U. L. Rev. 131 (2011).

10-1-393.11. Display of disclosure statement concerning kosher foods; required information; exception.

(a) A person who makes a representation regarding kosher food shall prominently and conspicuously display on the premises on which the food is sold, in a location readily visible to the consumer, a completed kosher food disclosure statement which shall be updated within 14 days of any changes in the information required by subsections (b) through (e) of this Code section.

(b) A kosher food disclosure statement shall set forth the name and address of the establishment to which it applies and the date on which it was completed.

(c) A kosher food disclosure statement shall state in the affirmative or negative whether the person:

(1) Operates under rabbinical or other kosher supervision;

(2) Sells or serves only food represented as kosher;

(3) Sells or serves food represented as kosher, as well as food not represented as kosher;

(4) Sells or serves meat, dairy, and pareve food;

(5) Sells or serves only meat and pareve food;

(6) Sells or serves only dairy and pareve food;

(7) Sells or serves meat and poultry represented as kosher only if it is slaughtered under rabbinical or other kosher supervision and identified at the slaughterhouse to be sold as kosher;

(8) Represents kosher meat sold as "Glatt kosher" or "Glatt";

(9) Sells or serves seafood only if it has or had fins and removable scales;

(10) Keeps separate meat represented as kosher, dairy represented as kosher, pareve food represented as kosher, and food not represented as kosher;

(11) Uses separate utensils for meat represented as kosher, dairy represented as kosher, pareve food represented as kosher, and food not represented as kosher;

(12) Uses separate work areas for meat and poultry represented as kosher, dairy represented as kosher, pareve food represented as kosher, and food not represented as kosher;

(13) Sells or serves wine represented as kosher only if it has rabbinical supervision;

(14) Sells or serves cheese represented as kosher only if it has rabbinical supervision;

(15) Sells or serves food represented as kosher for Passover;

(16) Uses separate utensils for food represented as kosher for Passover and food not represented as kosher for Passover;

(17) Uses separate work areas for food represented as kosher for Passover and food not represented as kosher for Passover;

(18) Keeps food represented as kosher for Passover free from and not in contact with food not represented as kosher for Passover; and

(19) Prepares food represented as kosher for Passover under rabbinical or other kosher supervision.

(d) If a kosher food disclosure statement has an affirmative response to the question contained in paragraph (15) of subsection (c) of this Code section, responses to the questions contained in paragraphs (16) through (19) shall be required; otherwise, such responses shall not be required.

(e) A person who represents to the public that any unpackaged food for sale or a place of business is under rabbinical or other kosher supervision shall also provide in the kosher food disclosure statement the following information about the rabbinical or other kosher supervision:

(1) The name of the supervising rabbi, agency, or other person;

(2) The address of the supervising rabbi, agency, or other person;

(3) The telephone number of the supervising rabbi, agency, or other person;

(4) The frequency with which the supervising rabbi, agency, or other person visits the establishment; and

(5) Any relevant affiliations of the supervising rabbi, agency, or other person that the person making the disclosure wishes to disclose.

(f) The administrator shall promulgate a form for the kosher food disclosure statement and any additional information that the administrator deems reasonable and necessary for full and complete disclosure. The completion and prominent and conspicuous display of such form shall constitute compliance with subsections (b) through (e) of this Code section.

(g) No person shall display a kosher food disclosure statement or other written document stating that a rabbi, agency, or other person certifies food or a place of business as kosher or kosher for Passover if no such certification is being provided. The person making the display shall remove the statement or document if the rabbi, agency, or other person sends a notice via certified mail or statutory overnight delivery directed to the person making the display that no such certification is being provided.

(h) It shall be unlawful for any person to:

(1) Fail to complete and prominently and conspicuously display a kosher food disclosure statement as required by this Code section;

(2) Otherwise fail to comply with this Code section; or

(3) Knowingly or intentionally, with intent to defraud, make a false affirmation or disclosure in a kosher food disclosure statement.

(i) This Code section shall not apply to:

(1) Food sold in a presealed kosher food package; or

(2) Food represented as "kosher-style" or "kosher-type." (Code 1981, § 10-1-393.11, enacted by Ga. L. 2010, p. 114, § 4/HB 1345.)

Effective date. — This Code section became effective July 1, 2010.

Editor's notes. — Ga. L. 2010, p. 114, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Kosher Food Consumer Protection Act.'"

10-1-393.12. Definitions; contract with residential roofing contractor.

(a) As used in this Code section, the term:

(1) "Residential real estate" means a new or existing building constructed for habitation by one to four families, including detached garages.

(2) "Residential roofing contractor" means a person or entity in the business of contracting or offering to contract with an owner or possessor of residential real estate to repair or replace roof systems.

(3) "Roof system" means a roof covering, roof sheathing, roof weatherproofing, roof framing, roof ventilation system, and insulation.

(b) A person who has entered into a written contract with a residential roofing contractor to provide goods or services to be paid from the proceeds of a property and casualty insurance policy may cancel the contract prior to midnight on the fifth business day after the insured has received written notice from the insurer that all or any part of the claim or contract is not a covered loss under such insurance policy. Cancellation shall be evidenced by the insured giving written notice of cancellation to the residential roofing contractor at the address stated in the contract. Notice of cancellation, if given by mail, shall be effective upon deposit into the United States mail, postage prepaid and properly addressed to the residential roofing contractor. Notice of cancellation need not take a particular form and shall be sufficient if it indicates, by any form of written expression, the intention of the insured not to be bound by the contract.

(c) Before entering a contract as provided in subsection (b) of this Code section, the residential roofing contractor shall:

(1) Furnish the insured a statement in boldface type of a minimum size of ten points, in substantially the following form:

> "You may cancel this contract at any time before midnight on the fifth business day after you have received written notification from your insurer that all or any part of the claim or contract is not a covered loss under the insurance policy. This right to cancel is in addition to any other rights of cancellation which may be found in state or federal law or regulation. See attached notice of cancellation form for an explanation of this right"; and

(2) Furnish each insured a fully completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract but easily detachable, and which shall contain in boldface type of a minimum size of ten points the following statement:

> "NOTICE OF CANCELLATION"
>
> If you are notified by your insurer that all or any part of the claim or contract is not a covered loss under the insurance policy, you may cancel the contract by mailing or delivering a signed and dated copy of this cancellation notice or any other written notice to (name of contractor) at (address of contrac-

tor's place of business) at any time prior to midnight on the fifth business day after you have received such notice from your insurer.

I HEREBY CANCEL THIS TRANSACTION

(date)

(insured's signature).

(d) In circumstances in which payment may be made from the proceeds of a property and casualty insurance policy, a residential roofing contractor shall not require any payments from an insured until the five-day cancellation period has expired. If, however, the residential roofing contractor has performed any emergency services, acknowledged by the insured in writing to be necessary to prevent damage to the premises, the residential roofing contractor shall be entitled to collect the amount due for the emergency services at the time they are rendered. Any provision in a contract as provided in subsection (b) of this Code section that requires the payment of any fee for anything except emergency services shall not be enforceable against any insured who has canceled a contract under this Code section.

(e) A residential roofing contractor shall not represent or negotiate, or offer or advertise to represent or negotiate, on behalf of an owner or possessor of residential real estate on any insurance claim in connection with the repair or replacement of roof systems. This subsection shall not apply to a public adjuster licensed under Chapter 23 of Title 33. (Code 1981, § 10-1-393.12, enacted by Ga. L. 2011, p. 613, § 1/HB 423.)

Effective date. — This Code section became effective July 1, 2011.

10-1-393.13. Oversight by administrator of certain telemarketing practices; definitions; conduct by telephone solicitors; class actions.

(a) As used in this Code section, the term:

(1) "ADAD equipment" means any device or system of devices which is used, whether alone or in conjunction with other equipment, for the purpose of automatically selecting or dialing telephone numbers and disseminating prerecorded messages to the numbers so selected or dialed.

(2) "Business" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, trust, or other legal entity.

(3) "Caller identification service" means a type of telephone service which permits subscribers to see the telephone number of incoming telephone calls.

(4) "In this state" means the call:

(A) Originates from this state; or

(B) Is directed by the caller to this state and received at the place to which it is directed.

(5) "Subscriber" means a person or business that has subscribed to telephone service from a local exchange company or mobile, wireless, or other telephone service provider or other persons living, residing, or working with such person or business.

(6) "Telephone solicitation" means any voice communication from a live operator, through the use of ADAD equipment or by other means, over a telephone line or computer network for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services or donation to any organization, but shall not include communications:

(A) To any subscriber with that subscriber's prior express invitation or permission;

(B) By or on behalf of any person or entity with whom a subscriber has a prior or current business or personal relationship; or

(C) Which convey a political message.

(b) Without otherwise limiting the definition of unfair or deceptive acts or practices under this part and without limiting any other Code section under this part, in connection with a telephone solicitation:

(1) At the beginning of such call, the person or entity making the call shall state clearly the identity of the person or entity initiating the call;

(2) No person or entity who makes a telephone solicitation to the telephone line of a subscriber in this state shall knowingly utilize any method to block or otherwise circumvent such subscriber's use of a caller identification service;

(3) The telephone number displayed on the caller identification service shall be a working telephone number capable of receiving incoming calls at the time the call is placed; and

(4) The identity of the caller displayed on the caller identification service shall accurately reflect the identity of the caller.

(c) Notwithstanding Code Section 10-1-399, a claim of a violation of this Code section may be brought in a representative capacity and may

be the subject of a class action under Code Section 9-11-23. Damages for such violation shall be the greater of actual damages or $10.00 per violation. (Code 1981, § 10-1-393.13, enacted by Ga. L. 2012, p. 640, § 1/HB 1132.)

Effective date. — This Code section became effective May 1, 2012.

10-1-396. Acts exempt from part.

Nothing in this part shall apply to:

(1) Actions or transactions specifically authorized under laws administered by or rules and regulations promulgated by any regulatory agency of this state or the United States;

(2) Acts done by the publisher, owner, agent, or employee of a newspaper, periodical, radio station or network, or television station or network in the publication or dissemination in print or electronically of:

(A) News or commentary; or

(B) An advertisement of or for another person, when the publisher, owner, agent, or employee did not have actual knowledge of the false, misleading, or deceptive character of the advertisement, did not prepare the advertisement, or did not have a direct financial interest in the sale or distribution of the advertised product or service. (Ga. L. 1975, p. 376, § 6; Ga. L. 2013, p. 613, § 2/HB 150.)

The 2013 amendment, effective May 6, 2013, rewrote paragraph (2).

JUDICIAL DECISIONS

Regulation under another act.
Mortgage borrower stated a claim against a loan servicer under the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., based on allegations that the servicer failed to properly credit payments, sent harassing collection letters, wrongfully threatened foreclosure, and improperly reported to credit bureaus that the loan was in default. Residential mortgage transactions were not categorically excluded from the FBPA, and the unfair and deceptive conduct alleged by the borrower was not specifically authorized under another statute. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

10-1-397. Authority of administrator to issue cease and desist order or impose civil penalty; judicial relief; receivers.

(a) As used in this Code section, the term:

(1) "Call" means any communication, message, signal, or transmission.

(2) "Telecommunications company" shall have the same meaning as provided in Code Section 46-5-162.

(3) "Telecommunications services" shall have the same meaning as provided in Code Section 46-5-162.

(b) Whenever it may appear to the administrator that any person is using, has used, or is about to use any method, act, or practice declared by this part or by regulations made under Code Section 10-1-394 to be unlawful and that proceedings would be in the public interest, whether or not any person has actually been misled, the administrator may:

(1) Subject to notice and opportunity for hearing in accordance with Code Section 10-1-398, unless the right to notice is waived by the person against whom the sanction is imposed, take any or all of the following actions:

(A) Issue a cease and desist order prohibiting any unfair or deceptive act or practice against any person; or

(B) Issue an order against a person who willfully violates this part, imposing a civil penalty of up to a maximum of $2,000.00 per violation; or

(2) Without regard as to whether the administrator has issued any orders under this Code section, upon a showing by the administrator in any superior court of competent jurisdiction that a person has violated or is about to violate this part, a rule promulgated under this part, or an order of the administrator, the court may enter or grant any or all of the following relief:

(A) A temporary restraining order or temporary or permanent injunction;

(B) A civil penalty of up to a maximum of $5,000.00 per violation of this part;

(C) A declaratory judgment;

(D) Restitution to any person or persons adversely affected by a defendant's actions in violation of this part;

(E) The appointment of a receiver, auditor, or conservator for the defendant or the defendant's assets; or

(F) Other relief as the court deems just and equitable.

(c) Unless the administrator determines that a person subject to this part designs quickly to depart from this state or to remove his or her property therefrom or to conceal himself or herself or his or her

property therein or that there is immediate danger of harm to citizens of this state or of another state, the administrator shall, unless he or she seeks a temporary restraining order to redress or prevent an injury resulting from a violation of paragraph (20) of subsection (b) of Code Section 10-1-393, before initiating any proceedings as provided in this Code section, give notice in writing that such proceedings are contemplated and allow such person a reasonable opportunity to appear before the administrator and execute an assurance of voluntary compliance as provided in this part. The determination of the administrator under this subsection shall be final and not subject to judicial review.

(d) With the exception of consent judgments entered before any testimony is taken, a final judgment under this Code section shall be admissible as prima-facie evidence of such specific findings of fact as may be made by the court which enters the judgment in subsequent proceedings by or against the same person or his or her successors or assigns.

(e) When a receiver is appointed by the court pursuant to this part, he or she shall have the power to sue for, collect, receive, and take into his or her possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes, and property of every description derived by means of any practice declared to be illegal and prohibited by this part, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. In the case of a partnership or business entity, the receiver may, in the discretion of the court, be authorized to dissolve the business and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

(f)(1) Whenever the administrator issues a cease and desist order to any person regarding the use of a telephone number which when called automatically imposes a per-call charge or other costs to the consumer, other than a regular charge imposed for long distance service, including, but not limited to, a telephone number in which the local prefix is 976 or in which the long distance prefix is 900, the administrator may certify to the appropriate local or long distance telecommunications company responsible for billing consumers for the charges that billing for the charges or for certain of the charges should be suspended. The telecommunications company shall then suspend such billing with reasonable promptness to preserve the assets of consumers in accordance with the certification, without incurring any liability to any person for doing so. For the purposes of

this Code section, "reasonable promptness to preserve the assets of consumers" shall mean to act as quickly as the telecommunications company would act to preserve its own assets, provided that the telecommunications company cannot be required to make any changes to its existing systems, technologies, or methods used for billing, other than any minimal procedural changes necessary to actually suspend the billing. The telecommunications company shall not be made a party to any proceedings under this part for complying with this requirement but shall have a right to be heard as a third party in any such proceedings.

(2) The suspension of billing under this subsection shall remain in effect until the administrator certifies to the telecommunications company that the matter has been resolved. The administrator shall certify to the telecommunications company with reasonable promptness when the matter has been resolved. In this certification, the administrator shall advise the telecommunications company to collect none of, all of, or any designated part of the billings in accordance with the documents or orders which resolved the matter. The telecommunications company shall collect or not collect the billings in the manner so designated and shall not incur any liability to any person for doing so.

(3) Nothing contained in this subsection shall limit or restrict the right of the telecommunications company to place its own restrictions, guidelines, or criteria, by whatever name denominated, upon the use of such telecommunications services, provided such restrictions, guidelines, or criteria do not conflict with the provisions of this subsection. (Ga. L. 1975, p. 376, §§ 7, 8; Ga. L. 1986, p. 1046, § 3; Ga. L. 1988, p. 983, § 2; Ga. L. 1988, p. 1659, § 1; Ga. L. 1991, p. 1101, § 2; Ga. L. 1991, p. 1346, § 1; Ga. L. 1995, p. 1362, § 2; Ga. L. 2000, p. 136, § 10; Ga. L. 2001, p. 1245, § 2; Ga. L. 2010, p. 114, § 5/HB 1345; Ga. L. 2010, p. 302, § 2/SB 368.)

The 2010 amendments. — The first 2010 amendment, effective July 1, 2010, substituted "this part" for "Code Section 10-1-393, 10-1-393.1, 10-1-393.2, 10-1-393.3, 10-1-393.4, 10-1-393.5, or 10-1-393.6" in the introductory paragraph of subsection (a). The second 2010 amendment, effective January 1, 2011, added present subsection (a); redesignated former subsections (a) through (e) as present subsections (b) through (f), respectively; in present subsection (b), substituted "this part" for "Code Section 10-1-393, 10-1-393.1, 10-1-393.2, 10-1-393.3, 10-1-393.4, 10-1-393.5, or 10-1-393.6" in the middle, and substituted "the administrator" for "he or she" at the end; inserted "of" in subparagraphs (b)(1)(B) and (b)(2)(B); in the first sentence of subsection (c), inserted "or her" twice, inserted "or herself" near the beginning, substituted "the administrator" for "he" near the middle, and inserted "or she"; in subsection (d), substituted "shall be" for "is" near the beginning and inserted "or her" near the end; in the first sentence of subsection (e), inserted "or she" and "or her" near the beginning; and, in subsection (f), substituted "telecommunications company" for "carrier" throughout, inserted two commas in the first sentence of paragraph (f)(1), inserted a comma in the third sen-

tence of paragraph (f)(2), and substituted "telecommunications services" for "telephone service" in the middle of paragraph (f)(3).

Editor's notes. — Ga. L. 2010, p. 114, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Kosher Food Consumer Protection Act.'"

10-1-399. Civil or equitable remedies by individuals.

Law reviews. — For article, "Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?," see 62 Mercer L. Rev. 449 (2011).

JUDICIAL DECISIONS

Analysis

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Illustrative Cases

General Consideration

Contractual defense of forum selection clause did not apply. — Trial court erred in granting summary judgment in favor of a health and nutrition multi-level distribution company in a physician's action alleging violations of the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., because the physician's claims were not res judicata based on a default judgment entered in favor of the company in a Texas court, and since the four corners of the physician's complaint reveal that the physician's claims were not based on breach of contract but were based on violation of the SBOA, the contractual defense of a forum selection clause did not apply; FBPA claims are not contract claims. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100 (2010), aff'd in part, 290 Ga. 261, 719 S.E.2d 489 (2011).

Court of appeals erred in ruling that a physician's claims that a limited liability company (LLC) violated the Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-399(b), were not barred by res judicata because the physician was barred by a Texas judgment from filing an FBPA claim against the LLC in Georgia, and a Georgia court could not make its own determination regarding whether the forum selection clause in the parties' agreement precluded the filing of an FBPA claim in Georgia; there was no public policy exception to the Full Faith and Credit Clause, and the Texas judgment went to the merits of, and adversely controlled, the physician's claim that the forum selection clause was inapplicable to an FBPA claim. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489 (2011).

Demand for Relief

Notice under Fair Business Practices Act.

Former homeowner was required to give notice to a defendant under O.C.G.A. § 10-1-399 even though the defendant was incorporated and had the defendant's principal place of business in a different state. There was no evidence that the defendant did not maintain a place of business in Georgia or keep some assets in Georgia, and the homeowner's contention was predicated on uncertified computer printouts from the Secretary of State's website, which were inadmissible under former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-920). Steed v. Fed. Nat'l Mortg. Corp., 301 Ga. App. 801, 689 S.E.2d 843 (2009).

Cause of Action

1. In General

Justifiable reliance must be shown if misrepresentation is alleged.

Purchasers of condominium units could not maintain the purchasers' claims against the developers and a broker for violation of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the purchasers could not show justifiable reliance as the purchasers were estopped from relying on an alleged representation that was made outside of a written agreement into which the purchasers entered. Novare Group, Inc. v. Sarif, 290 Ga. 186, 718 S.E.2d 304 (2011).

Illustrative Cases

Arbitration clause in a satellite television provider subscriber agreement. — Motion to compel arbitration of a putative class action was improperly denied under 9 U.S.C. §§ 2 and 16 because it was not unconscionable to require arbitration of the validity of an early cancellation fee charged by a satellite television provider in that the subscriber had the ability to recoup fees and expenses under the Georgia Fair Business Practices Act under O.C.G.A. §§ 10-1-393 and 10-1-399 if the subscriber prevailed individually. Cappuccitti v. DirecTV, Inc., 623 F.3d 1118 (11th Cir. 2010).

Health and nutrition multi-level distribution company. — Trial court erred in dismissing a physician's complaint against a health and nutrition multi-level distribution company's officers alleging violations of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., and the Georgia Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., on the ground that the court lacked personal jurisdiction because in response to requests for admissions, the company admitted that the company was a "multilevel distribution company" as defined in the SBOA, that the provisions of the SBOA, O.C.G.A. § 10-1-415(c)(4), applied to any agreement made in Georgia, that the officers were founding members of the company and were officers when the physician became a marketer; the officers also admitted that the physician's cancellation rights under Georgia law were generally known to the officers. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100 (2010), aff'd in part, 290 Ga. 261, 719 S.E.2d 489 (2011).

10-1-401. Limitation of actions; right to set off damages or penalties not limited.

JUDICIAL DECISIONS

Complaint time-barred. — Because plaintiff dry cleaners sued defendant natural gas supplier 33 months after the alleged misdeeds, and it was not alleged that any Georgia Public Service Commission proceedings had been initiated that would have postponed the accrual date under O.C.G.A. § 10-1-401(a)(2), the O.C.G.A. § 10-1-393(a) claim was time-barred by § 10-1-401(a)'s two-year limitations period. Byung Ho Cheoun v. Infinite Energy, Inc., No. 09-13902, 2010 U.S. App. LEXIS 1866 (11th Cir. Jan. 27, 2010) (Unpublished).

PART 3

MULTILEVEL DISTRIBUTION COMPANIES; SALE OF BUSINESS OPPORTUNITIES

10-1-410. Definitions.

JUDICIAL DECISIONS

Defendant found to be "seller." Officers of a limited liability company were "sellers" within the meaning of the Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410(10), because the officers were individuals who had a substantive interest in a multilevel distribution company or effectively controlled such company or the company's activities; accordingly, pursuant to the Fair Business Practices Act, O.C.G.A. § 10-1-399(a), and the SBOA, O.C.G.A. § 10-1-417(b), each officer was subject to personal liability for any violation of the SBOA which he or she had committed and which was proved by a physician. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489 (2011).

Claim sufficient against corporate officers. — Trial court erred in dismissing a physician's complaint against a health and nutrition multi-level distribution company's officers alleging violations of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., and the Georgia Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., on the ground that the court lacked personal jurisdiction because in response to requests for admissions, the company admitted that the company was a "multilevel distribution company" as defined in the SBOA, that the provisions of the SBOA, O.C.G.A. § 10-1-415, applied to any agreement made in Georgia, that the officers were founding members of the company and were officers when the physician became a marketer; the officers also admitted that the physician's cancellation rights under Georgia law were generally known to the officers, and the complaint was sufficient to state a claim against the officers. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100 (2010), aff'd in part, 290 Ga. 261, 719 S.E.2d 489 (2011).

RESEARCH REFERENCES

ALR. — Practices forbidden by state deceptive trade practice and consumer protection acts — pyramid or ponzi or referral sales schemes, 48 ALR6th 511.

10-1-413. Required disclosures; updating; form of notice.

RESEARCH REFERENCES

ALR. — Practices forbidden by state deceptive trade practice and consumer protection acts — pyramid or ponzi or referral sales schemes, 48 ALR6th 511.

10-1-415. Contracts to be in writing; delivery of copy; required provisions; cancellation rights.

Law reviews. — For annual survey on business corporations, see 64 Mercer L. Rev. 61 (2012).

JUDICIAL DECISIONS

Cancellation of multi-level distribution agreement. — Trial court erred in dismissing a physician's complaint against a health and nutrition multi-level distribution company's officers alleging violations of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., and the Georgia Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., on the ground that the court lacked personal jurisdiction because in response to requests for admissions, the company admitted that the company was a "multilevel distribution company" as defined in the SBOA, that the provisions of the SBOA, O.C.G.A. § 10-1-415(c)(4), applied to any agreement made in Georgia, that the officers were founding members of the company and were officers when the physician became a marketer; the officers also admitted that the physician's cancellation rights under Georgia law were generally known to the officers. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100 (2010), aff'd in part, 290 Ga. 261, 719 S.E.2d 489 (2011).

Summary judgment improper. — Trial court erred in holding that a physician failed to allege that the physician sustained damages due to the failure of a health and nutrition multi-level distribution company to inform the physician of the physician's buy-back rights under the Georgia Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., because the physician presented sufficient evidence of reliance and damages to withstand a motion for summary judgment since the physician alleged that the physician relied on the company to disclose the physician's rights under Georgia law and that the company refused to comply with the product repurchase requirements of the SBOA, O.C.G.A. § 10-1-415(d)(1); the company's contract clause providing that state laws on termination applied if the laws were inconsistent with the contract was insufficient to constitute compliance with O.C.G.A. § 10-1-415(c)(3), and whether the company gave proper "notice" to the physician that the company amended the company's online policies and procedures to comply with Georgia law and whether the physician should have asserted the physician's legal rights earlier were genuine issues of material fact for a jury to decide. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100 (2010), aff'd in part, 290 Ga. 261, 719 S.E.2d 489 (2011).

Contractual defense of forum selection clause did not apply. — Trial court erred in granting summary judgment in favor of a health and nutrition multi-level distribution company in a physician's action alleging violations of the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410 et seq., because the physician's claims were not res judicata based on a default judgment entered in favor of the company in a Texas court, and since the four corners of the physician's complaint reveal that the physician's claims were not based on breach of contract but were based on violation of the SBOA, the contractual defense of a forum selection clause did not apply; FBPA claims are not contract claims. Walker v. Amerireach.com, 306 Ga. App. 658, 703 S.E.2d 100 (2010), aff'd in part, 290 Ga. 261, 719 S.E.2d 489 (2011).

Jurisdiction over corporate officers in action alleging violations of the Georgia Sale of Opportunities Act. — Court of appeals did not err in ruling that a trial court had personal jurisdiction over the officers of a limited liability company (LLC) in a physician's action alleging that the officers violated the Sale of Business Opportunities Act, O.C.G.A. § 10-1-415(d)(1), because the allegations of a physician's complaint were sufficient to withstand the attack on the trial court's jurisdiction over the officers on the ground that the officers acted in the officers' corporate capacities; the "fiduciary shield" doctrine did not apply, and the allegations in the complaint supported a finding that the officers were "primary participants" in the LLC's transaction of business within the state, that the cause of action arose from or was connected with such act or transaction, and that the "minimum contacts" test was therefore met.

Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489 (2011).

10-1-417. Purchaser and participant remedies; violations as unfair or deceptive acts; penalty.

JUDICIAL DECISIONS

Jurisdiction over corporate officers in action alleging violations of the Georgia Sale of Opportunities Act. — Court of appeals did not err in ruling that a trial court had personal jurisdiction over the officers of a limited liability company (LLC) in a physician's action alleging that the officers violated the Sale of Business Opportunities Act, O.C.G.A. § 10-1-415(d)(1), because the allegations of a physician's complaint were sufficient to withstand the attack on the trial court's jurisdiction over the officers on the ground that the officers acted in the officers' corporate capacities; the "fiduciary shield" doctrine did not apply, and the allegations in the complaint supported a finding that the officers were "primary participants" in the LLC's transaction of business within the state, that the cause of action arose from or was connected with such act or transaction, and that the "minimum contacts" test was therefore met. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489 (2011).

Corporate officers personally liable. — Officers of a limited liability company were "sellers" within the meaning of the Sale of Business Opportunities Act (SBOA), O.C.G.A. § 10-1-410(10), because the sellers were individuals who had a substantive interest in a multilevel distribution company or effectively controlled such company or the company's activities; accordingly, pursuant to the Fair Business Practices Act, O.C.G.A. § 10-1-399(a), and the SBOA, O.C.G.A. § 10-1-417(b), each officer was subject to personal liability for any violation of the SBOA which he or she had committed and which was proved by a physician. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489 (2011).

ARTICLE 16

TRADEMARKS, SERVICE MARKS, AND TRADE NAMES

Law reviews. — For article, "The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer," see 43 Ga. L. Rev. 451 (2009). For article, "The Globalization of Intellectual Property Rights: Trips, Bits, and the Search for Uniform Protection," see 38 Ga. J. Int'l & Comp. L. 265 (2010). For article, "Intellectual Property Checklist for Marketing the Recording Artist Online," see 18 J. Intell. Prop. L. 541 (2011). For article, "Clearing the Way: Acquiring Rights and Approvals for Music Use in Media Applications," see 18 J. Intell. Prop. L. 561 (2011).

For note, "The Ongoing Royalty: What Remedy Should a Patent Holder Receive When a Permanent Injunction Is Denied," see 43 Ga. L. Rev. 543 (2009). For note, "How to Get the Mona Lisa in your Home Without Breaking the Law: Painting a Picture of Copyright Issues with Digitally Accessible Museum Collections," see 18 J. Intell. Prop. L. 567 (2011).

For comment, "Pay What You Like — No, Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses," see 58 Emory L.J. 1495 (2009).

PART 1

REGISTRATION AND USE OF TRADEMARKS AND SERVICE MARKS

Law reviews. — For article, "Confusion Codified: Why Trademark Remedies Make No Sense," see 17 J. Intell. Prop. L. 245 (2010).

10-1-440. Definitions; when trademark or service mark used in state.

JUDICIAL DECISIONS

Bona fide use of trademark required to make infringement claim. — Trial court did not err in granting the Georgia Lottery Corporation (GLC) and a company summary judgment in trademark holders' action alleging trademark infringement because Georgia law did not authorize the holders' claims against GLC since the latter used the logo first and extensively on a series of lottery games over ten years when the holders' efforts to market their game were a conspicuous failure, and since there was no likelihood of confusion between the two games; O.C.G.A. § 10-1-440 requires the bona fide use of a trademark to make out a claim concerning the trademark's infringement. Kyle v. Ga. Lottery Corp., 304 Ga. App. 635, 698 S.E.2d 12 (2010).

Court of appeals did not err in affirming an order granting the Georgia Lottery Corporation summary judgment as to a trademark infringement claim on the ground that the trademark holders did not make a "bona fide" use of their mark in commerce sufficient to establish protectable rights in the mark because the court of appeals properly ruled that O.C.G.A. § 10-1-440 required the bona fide use of a trademark to make out a claim concerning the trademark's infringement; interpreting O.C.G.A. § 10-1-440(b) to contain a bona fide use requirement is neither inconsistent with the statutory definition nor does it improperly expand the application of the statute because it merely excludes from the definition of "use" any dishonest or bad faith motives on the part of the person obtaining and using a trademark, a result not inconsistent with the language of the General Assembly. Kyle v. Ga. Lottery Corp., 290 Ga. 87, 718 S.E.2d 801 (2011).

10-1-444. Registration of marks.

Upon compliance by the applicant with the requirements of this part, the Secretary of State shall cause a certificate of registration to be issued and delivered to the applicant. The certificate of registration shall be issued under the signature of the Secretary of State and the seal of the state and it shall show the name and business address and, if a corporation, the state of incorporation, of the person claiming ownership of the trademark or service mark; the date claimed for the first use of the trademark or service mark anywhere and the date claimed for the first use of the trademark or service mark in this state; the class of goods or services and a description of the goods or services on which the trademark or service mark is used; a reproduction of the trademark or service mark; the registration date; and the term of the registration. (Ga. L. 1893, p. 134, § 3; Civil Code 1895, § 1738; Civil Code 1910, § 1990; Code 1933, § 106-102; Ga. L. 1949, p. 949, § 1; Ga.

L. 1952, p. 134, § 9; Ga. L. 1963, p. 463, § 4; Ga. L. 1982, p. 3, § 10; Ga. L. 2011, p. 99, § 15/HB 24.)

The 2011 amendment, effective January 1, 2013, deleted the former undesignated second paragraph, which read: "Any certificate of registration issued by the Secretary of State under the provisions of this Code section or a copy thereof duly certified by the Secretary of State shall be admissible in evidence as competent and sufficient proof of the registration of such trademark or service mark in any action or judicial proceedings in any court of this state." See editor's note for applicability.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

10-1-448. Cancellation of registrations.

RESEARCH REFERENCES

ALR. — Application of defense of laches in action to cancel trademark, 64 ALR Fed. 2d 255.

10-1-450. Civil action for infringement of registered mark.

JUDICIAL DECISIONS

Registration required.

Limited liability company was entitled to summary judgment on the investment partnership's claims under § 43(a) (15 U.S.C. § 1125(a)) of the Lanham Act and O.C.G.A. §§ 10-1-450 and 10-1-451 that the company infringed the trademarks and trade dress associated with three brands because: (1) the trademark was not registered with the Georgia Secretary of State pursuant to §§ 10-1-450 and 10-1-451; and (2) there was no evidence to show that the trade dress associated with the products at issue was inherently distinctive as a matter of law and there was no evidence that the mark had secondary meaning identifying the investment partnership as the source of any products. Brown Bark II, L.P. v. Dixie Mills, LLC, 732 F. Supp. 2d 1353 (N.D. Ga. 2010).

10-1-451. Injunctions against infringement; recovery of profits and damages; destruction or disposal of counterfeit trademarks; seizure.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Registration required for relief.

Limited liability company was entitled to summary judgment on the investment partnership's claims under § 43(a) (15 U.S.C. § 1125(a)) of the Lanham Act and

O.C.G.A. §§ 10-1-450 and 10-1-451 that the company infringed the trademarks and trade dress associated with three brands because: (1) the trademark was not registered with the Georgia Secretary of State pursuant to §§ 10-1-450 and 10-1-451; and (2) there was no evidence to show that the trade dress associated with the products at issue was inherently distinctive as a matter of law and there was no evidence that the mark had secondary meaning identifying the investment partnership as the source of any products. Brown Bark II, L.P. v. Dixie Mills, LLC, 732 F. Supp. 2d 1353 (N.D. Ga. 2010).

Confusingly similar names.

Trademark owners were entitled to summary judgment on infringement under 15 U.S.C. §§ 1114 and 1125 and O.C.G.A. § 10-1-451 because the mark used by former agents of the owners was decidedly similar, there was a substantial likelihood of consumer confusion, and the agents intended to capitalize on the reputation and to infringe on the market for money orders and money transfers created by the owners. W. Union Holdings, Inc. v. E. Union, Inc., 316 Fed. Appx. 850 (11th Cir. 2008) (Unpublished).

Failure to challenge issue in appellate brief. — Promoter did not in the promoter's brief challenge the adverse judgment on the promoter's dilution of trademark claim under O.C.G.A. § 10-1-451 which the district court did not base on a likelihood of confusion. Therefore, because the appellate court deemed issues not clearly briefed on appeal to be abandoned, it left the state-law dilution of trademark portion of the judgment undisturbed. Caliber Auto. Liquidators, Inc. v. Premier Chrysler, Jeep, Dodge, LLC, 605 F.3d 931 (11th Cir. 2010).

ARTICLE 17

RIGHTS IN WORKS OF FINE ART

Law reviews. — For article, "Intellectual Property Checklist for Marketing the Recording Artist Online," see 18 J. Intell. Prop. L. 541 (2011). For article, "Clearing the Way: Acquiring Rights and Approvals for Music Use in Media Applications," see 18 J. Intell. Prop. L. 561 (2011).

For note, "How to Get the Mona Lisa in your Home Without Breaking the Law: Painting a Picture of Copyright Issues with Digitally Accessible Museum Collections," see 18 J. Intell. Prop. L. 567 (2011).

For comment, "Pay What You Like — No, Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses," see 58 Emory L.J. 1495 (2009).

ARTICLE 17A

CONSIGNMENT OF ART

Law reviews. — For article, "The Protection of Visual Artists Through Consignment of Art Statutes," see 18 J. Intell. Prop. L. 551 (2011).

ARTICLE 21

BUYING SERVICES

10-1-594. Application for license; renewal; fee.

(a) Application for a license as a buying service or club shall be made on forms prescribed by the administrator and shall contain such information and supporting documents as he may require.

(b) Licenses shall be issued for a period of one year and shall be renewable within 90 days preceding the expiration thereof.

(c) The fee for a license or for the renewal thereof shall be $50.00, payable to the administrator for deposit by the Office of the State Treasurer in the general fund of the state. (Ga. L. 1975, p. 529, § 5; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 1993, p. 1402, § 18; Ga. L. 2010, p. 863, § 2/SB 296.)

The 2010 amendment, effective July 1, 2010, substituted "Office of the State Treasurer" for "Office of Treasury and Fiscal Services" in the middle of subsection (c).

ARTICLE 22

MOTOR VEHICLE FRANCHISE PRACTICES

Part 1

General Consideration

10-1-620. Short title.

JUDICIAL DECISIONS

Anti-encroachment provision construed. — Under the Georgia Motor Vehicle Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., a corporate dealership's relevant market area, the area for which the dealer has standing to resist competition by a new or relocated dealership of the same franchisor, is the area located within an eight-mile radius of where a dealer qualified as such because the dealer is engaged in the business of selling new motor vehicles, sells those vehicles, or when a dealer qualified as such because the dealer engages exclusively in the repair of motor vehicles. WMW, Inc. v. Am. Honda Motor Co., 291 Ga. 683, 733 S.E.2d 269 (2012).

10-1-621. Legislative findings.

JUDICIAL DECISIONS

Cited in WMW, Inc. v. Am. Honda Motor Co., 291 Ga. 683, 733 S.E.2d 269 (2012).

10-1-622. Definitions.

As used in this article, the term:

(1) "Dealer" means any person engaged in the business of selling, offering to sell, soliciting, or advertising the sale of new motor vehicles and who is licensed or otherwise authorized to utilize trademarks or service marks associated with one or more makes of

motor vehicles in connection with such sales. The term "dealer" shall also include any person who engages exclusively in the repair of motor vehicles, except motor homes, if such repairs are performed pursuant to the terms of a franchise or other agreement with a franchisor or such repairs are performed as part of a manufacturer's or franchisor's warranty. The term "dealer" shall not mean any person engaged solely in the business of selling used motor vehicles.

(2) "Dealership" means:

(A) The dealer, if the dealer is a corporation, partnership, or other business organization; or

(B) All business assets used in connection with the dealer's business pursuant to the franchise including, but not limited to, the dealership facilities, the franchise, inventory, accounts receivable, and good will if the dealer is an individual.

(3) "Dealership facilities" means the location at which a dealer, pursuant to a franchise, maintains a permanent showroom for new motor vehicles.

(4) "Designated successor" means any person or child who, in the case of the owner's death, is entitled to inherit the ownership interest in the dealership under the owner's will or who, in the case of an incapacitated owner, has been appointed by a court as the legal representative of the owner's property or has been otherwise lawfully nominated or constituted to manage the dealership on behalf of the owner. A "designated successor" may also mean a person specifically named in the franchise agreement or any addendum to the franchise agreement.

(5) "Distributor" means any person, resident or nonresident, who directly or indirectly in the ordinary course of business and on a recurring basis sells such new motor vehicles to a dealer for resale if such person is the principal supplier of any make of motor vehicle for two or more dealers.

(6) "Franchise" means the written agreement or contract between any franchisor and any dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract and pursuant to which the dealer purchases and resells motor vehicles or leases or rents the dealership facilities. A franchisor is prohibited from effectuating through any letter, memo, or other document or electronic communication any action or terms that this article makes unlawful when included in a franchise agreement.

(7) "Franchisor" means:

(A) Any person, resident or nonresident, who directly or indirectly licenses or otherwise authorizes one or more dealers to use a

trademark or service mark associated with a make of motor vehicle in connection with the retail sale of new motor vehicles bearing such trademark or service mark;

(B) Any person who in the ordinary course of business and on a recurring basis sells such new motor vehicles to a dealer for resale; and

(C) Any person, other than a person who finances the purchase or lease of motor vehicles, who is controlled by a franchisor or more than 10 percent owned by a franchisor, as that term is defined in subparagraphs (A) and (B) of this paragraph.

(8) "Good faith" means honesty in fact and the observation of reasonable commercial standards of fair dealing in the trade as defined and interpreted in Code Section 11-1-203.

(8.1) "Line-make" is a collection of models, series, or groups of motor vehicles manufactured by or for a particular manufacturer, distributor, or importer that are offered for sale, lease, or distribution pursuant to a common brand name or mark; provided, however:

(A) Multiple brand names or marks may constitute a single line-make, but only when included in a common dealer agreement and the manufacturer, distributor, or importer offers such vehicles bearing the multiple names or marks together only, and not separately, to its authorized dealers; and

(B) Motor vehicles bearing a common brand name or mark may constitute separate line-makes when pertaining to motor vehicles subject to separate dealer agreements or when such vehicles are intended for different types of use.

(9) "Manufacturer" means any person who performs the major portion of the assembly of a new motor vehicle.

(10) "Motor vehicle" means every self-propelled vehicle intended primarily for use and operation on the public highways, except farm tractors and other machines and tools used in the production, harvesting, and care of farm products, construction equipment, and recreational vehicles as defined in paragraph (5) of subsection (a) of Code Section 10-1-679.

(11) "New motor vehicle" means a motor vehicle which has been sold to a dealer and on which the original motor vehicle title has not been issued.

(12) "Owner" means any person holding an ownership interest in a dealership.

(13) "Person" means every natural person, partnership, corporation, association, trust, estate, or any other legal entity.

(13.1) "Relevant market area" means the area located within an eight-mile radius of an existing dealership.

(14) "Warrantor" means any person who gives a warranty in connection with a new motor vehicle.

(15) "Warranty" means a written document signed or authorized by the party on whose behalf it is given which is made or given incident to the sale or lease of a new motor vehicle which contains either statements or promises that said new motor vehicle meets or will meet certain standards or promises to perform certain repairs or other services in connection with said new motor vehicle if necessary. Such term does not include service contracts, mechanical or other insurance, or "extended warranties" sold for separate consideration by a dealer or other person not controlled by a manufacturer or distributor. (Code 1981, § 10-1-622, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, § 1; Ga. L. 2005, p. 1233, § 1/SB 155; Ga. L. 2010, p. 988, § 2/HB 1072.)

The 2010 amendment, effective June 4, 2010, added paragraph (8.1).

Editor's notes. — Ga. L. 2010, p. 988, § 1, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

Law reviews. — For annual survey on business corporations, see 64 Mercer L. Rev. 61 (2012).

JUDICIAL DECISIONS

Franchisee's standing to seek to enjoin establishment of competing dealership. — Franchisee did not have standing to seek to enjoin the establishment of a competing dealership within eight miles of the franchisee's service center because: (1) for purposes of the statute, the franchisee's relevant market area was the area within eight miles of an existing dealership; (2) "dealership" meant the "person" of the corporate franchisee; (3) the franchisee's principal place of business and registered office were at a location other than the service center, which location was more than eight miles from the new dealership's proposed location; so, (4) under the plain language of O.C.G.A. § 10-1-664(b), the service center was not, by definition, an existing dealership in whose relevant market area the franchisor intended to establish a new dealership since, under O.C.G.A. § 10-1-622(1) and (2)(A), "dealership" or "dealer" was defined as the "person," which in this case was a corporation, and a corporate "dealership" or "dealer" was not defined according to the corporation's facilities. WMW, Inc. v. Am. Honda Motor Co., 311 Ga. App. 1, 714 S.E.2d 689 (2011).

Under the Georgia Motor Vehicle Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., a corporate dealership's relevant market area, the area for which the dealer has standing to resist competition by a new or relocated dealership of the same franchisor, is the area located within an eight-mile radius of where a dealer qualified as such because the dealer is engaged in the business of selling new motor vehicles, sells those vehicles, or where a dealer qualified as such because the dealer engages exclusively in the repair of motor

vehicles. WMW, Inc. v. Am. Honda Motor Co., 291 Ga. 683, 733 S.E.2d 269 (2012).

10-1-623. Action for violation of article; punitive damages; equitable relief; standing; venue.

(a) Notwithstanding the terms, provisions, or conditions of any agreement or franchise or other terms or provisions of any novation, waiver, or other written instrument, any person who is or may be injured by a violation of a provision of this article or any party to a franchise who is so injured in his or her business or property by a violation of a provision of this article relating to that franchise or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of this article may file a petition with the Department of Revenue as provided in Code Section 10-1-667 or may bring an action in any court of competent jurisdiction for damages and equitable relief including injunctive relief. Said person may recover damages therefor in any amount equal to the greater of (1) the actual pecuniary loss or (2) three times the actual pecuniary loss, not to exceed $750,000.00. In addition, said person may recover costs and reasonable attorney's fees as damages. Upon a prima-facie showing by the person filing the petition or cause of action that a violation of this article has occurred, the burden of proof shall then be upon the opposing party to prove that such violation did not occur.

(b) If the franchisor engages in aggravated or continued multiple intentional violations of a provision or provisions of this article, the court may award punitive damages in addition to any other damages authorized under this part.

(c) A dealer, owner, or other party, if he has not suffered any loss of money, property, employment rights, or business opportunity, may obtain final equitable relief if it can be shown that the violation of a provision of this article by a franchisor may have the effect of causing such loss of money, property, employment rights, or business opportunity.

(d) This Code section shall not prevent a dealer from voluntarily entering into a valid release agreement to resolve a specific claim, dispute, or action between the franchisor and the dealer or when separate and adequate consideration is offered and accepted, provided that the renewal of a franchise shall not by itself constitute separate and adequate consideration.

(e) Any corporation or association which is primarily owned by or comprised of dealers and which primarily represents the interests of dealers shall have standing to file a petition or cause of action with the

Department of Revenue or with any court of competent jurisdiction for itself or by, for, or on behalf of any dealer or group of dealers for an alleged violation of this article or for the determination of any rights created by this article.

(f) In addition to any county in which venue is proper in accordance with any provision of the Constitution of this state or any other provision of this Code, in any cause of action brought against a manufacturer, franchisor, or distributor which is a corporation by a dealer for any alleged breach of the franchise agreement or alleged violation of this article or for the determination of any rights created by the franchise agreement or this article, venue shall be proper in the county in which the dealer engaged in the business of selling the products or services of such manufacturer, franchisor, or distributor, and the manufacturer, franchisor, or distributor which is a corporation shall be deemed to reside in such county for venue purposes. Any provision of a franchise or other agreement, under which the parties determine, agree to, control, restrict, establish, limit, or direct the venue in which a cause of action under this article shall be brought, shall be void. (Code 1981, § 10-1-623, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, § 2; Ga. L. 2000, p. 136, § 10; Ga. L. 2010, p. 988, § 3/HB 1072.)

The 2010 amendment, effective June 4, 2010, added "to resolve a specific claim, dispute, or action between the franchisor and the dealer or when separate and adequate consideration is offered and accepted, provided that the renewal of a franchise shall not by itself constitute separate and adequate consideration" at the end of subsection (d).

Editor's notes. — Ga. L. 2010, p. 988, § 1, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

10-1-624. Persons subject to article; written instruments violating article void; franchisor's use of subsidiary to accomplish illegal act.

(a) Any person who engages directly or indirectly in purposeful contacts within this state in connection with the offering of advertising for sale or has business dealings with respect to a new motor vehicle sale within this state shall be subject to the provisions of this article and shall be subject to the jurisdiction of the courts of this state.

(b) The applicability of this article shall not be affected by a choice of law clause in any franchise, agreement, waiver, novation, or any other written instrument.

(c) Any provision of any franchise, agreement, waiver, novation, or any other written instrument executed, modified, extended, or renewed after July 1, 1983, which is in violation of any Code section of this article, and any amendments thereto, shall be deemed null and void and without force and effect.

(d) No franchisor shall use any subsidiary corporation, affiliated corporation, or any other controlled corporation, partnership, association, or person to accomplish what would otherwise be illegal conduct under this article on the part of the franchisor. (Code 1981, § 10-1-624, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2010, p. 988, § 4/HB 1072.)

The 2010 amendment, effective June 4, 2010, inserted ", and any amendments thereto," in subsection (c).

Editor's notes. — Ga. L. 2010, p. 988, § 1, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

10-1-627. Waiver of article void; voluntary releases valid.

No franchisor, nor any agent nor employee of a franchisor, shall use a written instrument, agreement, or waiver to attempt to nullify any of the provisions of this article and any such agreement, written instrument, or waiver shall be null and void. This Code section shall not prevent a dealer from voluntarily entering into a valid release agreement to resolve a specific claim, dispute, or action between the franchisor and the dealer or when separate and adequate consideration is offered and accepted, provided that the renewal of a franchise shall not by itself constitute separate and adequate consideration. (Code 1981, § 10-1-627, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2010, p. 988, § 5/HB 1072.)

The 2010 amendment, effective June 4, 2010, added "to resolve a specific claim, dispute, or action between the franchisor and the dealer or when separate and adequate consideration is offered and accepted, provided that the renewal of a franchise shall not by itself constitute separate and adequate consideration" at the end of this Code section.

Editor's notes. — Ga. L. 2010, p. 988, § 1, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

PART 3

MOTOR VEHICLE WARRANTY PRACTICES

10-1-641. Dealer's predelivery preparation, warranty service, and recall work obligations to be provided in writing; recovery of costs.

(a)(1) Each distributor, manufacturer, or warrantor:

(A) Shall specify in writing to each of its dealers in this state the dealer's obligations for predelivery preparation including the repair of damages incurred in the transportation of vehicles as set forth in Code Section 10-1-642, recall work, and warranty service on its products;

(B) Shall compensate the dealer for such work and service required of the dealer by the distributor, manufacturer, or warrantor;

(C) Shall provide the dealer with a schedule of compensation to be paid such dealer for parts, work, and service in connection therewith; and

(D) Shall provide the dealer with a schedule of the time allowance for the performance of such work and service. Any such schedule of compensation shall include reasonable compensation for diagnostic work, repair service, and labor. Time allowances for the diagnosis and performance of such work and service shall be reasonable and adequate for the work to be performed.

(2) In the determination of what constitutes reasonable compensation for parts reimbursement and labor rates under this Code section, the principal factors to be considered shall be the retail price paid to dealers for parts and the prevailing hourly labor rates paid to dealers doing the repair, work, or service and to other dealers in the community in which the dealer doing the repair, work, or service is doing business for the same or similar repair, work, or service. However, in no event shall parts reimbursement paid to the dealer be less than the retail price for such parts being paid to such dealer by nonwarranty customers for nonwarranty parts replacement, and in no event shall the hourly labor rate paid to a dealer for such warranty repair, work, or service be less than the rate charged by such dealer for like repair, work, or service to nonwarranty customers for nonwarranty repair, work, or service.

(b) Manufacturers and distributors shall include in written notices of factory recalls to new motor vehicle owners and dealers the expected date by which necessary parts and equipment will be available to

dealers for the correction of such defects. Manufacturers and distributors shall compensate any dealers in this state for repairs affected by all recalls.

(c) All such claims shall be either approved or disapproved within 30 days after their receipt on forms and in the manner specified by the manufacturer, distributor, or warrantor, and any claim not specifically disapproved in writing within 30 days after the receipt shall be construed to be approved and payment must follow within 30 days.

(d) Subject to subsection (c) of Code Section 10-1-645, a manufacturer or distributor shall not otherwise recover its costs from dealers within this state, including an increase in the wholesale price of a vehicle or surcharge imposed on a dealer solely intended to recover the cost of reimbursing the dealer for parts and labor pursuant to this Code section, provided that a manufacturer or distributor shall not be prohibited from increasing prices for vehicles or parts in the normal course of business. (Code 1981, § 10-1-641, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, § 3; Ga. L. 2010, p. 988, § 6/HB 1072.)

The 2010 amendment, effective June 4, 2010, substituted "affected" for "effected" in the last sentence of subsection (b) and added subsection (d).

Editor's notes. — Ga. L. 2010, p. 988, § 1, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

Part 4

Motor Vehicle Franchise Continuation and Succession

10-1-651. Termination of franchise; grounds; notice; dealer costs reimbursed by franchisor; applicability to distributors.

(a) Notwithstanding the terms, provisions, or conditions of any franchise and notwithstanding the terms or provisions of any waiver, no franchisor shall cancel, terminate, or fail to renew any franchise with a dealer unless the franchisor:

(1) Has satisfied the notice requirement of subsection (e) of this Code section; and

(2) Has good cause for cancellation, termination, or nonrenewal.

(b) Notwithstanding the terms, provisions, or conditions of any franchise or the terms or provisions of any waiver, good cause shall exist

for the purposes of a termination, cancellation, or nonrenewal when there is a failure by the dealer to comply with a provision of the franchise which is both reasonable and of material significance to the franchise relationship, provided the dealer has been notified in writing of the failure within 180 days after the franchisor first acquired knowledge of such failure or after the dealer is given a reasonable opportunity to correct such failure for a period of not less than 180 days.

(c) If the failure by the dealer, as defined in subsection (b) of this Code section, relates to the performance of the dealer in sales or service, then good cause shall be defined as the failure of the dealer to comply with reasonable performance criteria established by the franchisor in light of existing circumstances, including but not limited to current and forecasted economic conditions, provided the following conditions are satisfied:

(1) The dealer was notified by the franchisor in writing of such failure;

(2) Said notification stated that notice was provided of failure of performance pursuant to this Code section; and

(3) The dealer was afforded a reasonable opportunity, for a period of not less than six months, to comply with such criteria.

(d) The franchisor shall have the burden of proof under this Code section.

(e)(1) Notwithstanding franchise terms to the contrary, prior to the termination, cancellation, or nonrenewal of any franchise, the franchisor shall furnish notification, as provided in paragraph (2) of this subsection, of such termination, cancellation, or nonrenewal to the dealer as follows:

(A) Not less than 90 days prior to the effective date of such termination, cancellation, or nonrenewal;

(B) Not less than 15 days prior to the effective date of such termination, cancellation, or nonrenewal with respect to any of the following:

(i) Insolvency of the dealer, or filing of any petition by or against the dealer under any bankruptcy or receivership law;

(ii) Failure of the dealer to conduct its customary sales and service operations during its customary business hours for seven consecutive business days, except for acts of God or circumstances beyond the direct control of the dealer;

(iii) Conviction of the dealer, general manager, or managing executive or any owner with a substantial interest therein of any

crime which materially relates to the operation of the dealership or any felony which is punishable by imprisonment;

(iv) Suspension for a period of more than 14 days or revocation of any license which the dealer is required to have to operate a dealership; or

(v) Fraud or intentional misrepresentation by the dealer which materially affects the franchise, provided the franchisor gives notice within one year of the time when the fraud or misrepresentation occurred or was discovered, whichever is later; or

(C) Not less than 180 days prior to the effective date of such termination or cancellation where the franchisor is discontinuing the sale of the product line.

(2) Notification under this Code section shall be in writing and shall be by certified mail or statutory overnight delivery or personally delivered to the dealer and shall contain:

(A) A statement of intention to terminate, cancel, or not to renew the franchise;

(B) A statement of the reasons for the termination, cancellation, or nonrenewal; and

(C) The date on which such termination, cancellation, or nonrenewal is to take effect.

(f)(1)(A) Upon the termination, cancellation, or nonrenewal of any franchise by the franchisor, the franchisor shall repurchase from the dealer any new and undamaged motor vehicles of the current and one year prior model year and acquired by the dealer within 12 months of the date of termination, cancellation, or nonrenewal so long as such motor vehicles have been acquired from the franchisor or from another dealer of the same line-make in the ordinary course of business prior to receipt of the notice of termination, cancellation, or nonrenewal and so long as such motor vehicles have not been altered, damaged, or materially changed while in the dealer's possession. Any new motor vehicle repurchased by the franchisor shall be repurchased at the net cost to the dealer. For purposes of this subparagraph, a motor vehicle shall be considered new if it has less than 500 miles on the odometer and has not been issued a certificate of title.

(B) In addition to the motor vehicles repurchased under subparagraph (A) of this paragraph, the franchisor shall repurchase demonstration motor vehicles acquired by the dealer within 12 months of the date of termination, cancellation, or nonrenewal so

long as such motor vehicles have been acquired from the franchisor or from another dealer of the franchisor prior to receipt of the notice of termination, cancellation, or nonrenewal and so long as such motor vehicles have not been altered, damaged, or materially changed and so long as such motor vehicles do not have more than 6,000 miles each on their odometers. Any such demonstration motor vehicle shall be repurchased at the net cost to the dealer less an allowance for use equal to the net cost to the dealer times the current mileage divided by 100,000. The franchisor shall repurchase a number of demonstration motor vehicles equal to 10 percent of the number of motor vehicles repurchased under subparagraph (A) of this paragraph; however, in no event shall the number of demonstration motor vehicles which the franchisor is required to repurchase ever be less than two or more than 15 motor vehicles.

(C) For purposes of this paragraph, a motor vehicle shall not be deemed to have been altered, damaged, or materially changed if it has been provided with original equipment or with nonoriginal equipment which does not alter, damage, or materially change the motor vehicle, such as undercoating, pinstriping, interior conditioning, or paint sealant.

(2) Upon the termination, cancellation, or nonrenewal of any franchise by the dealer, the franchisor shall repurchase from the dealer any new and undamaged motor vehicles, except motorcycles as defined in paragraph (29) of Code Section 40-1-1 and except motor homes as defined in paragraph (31) of Code Section 40-1-1 and except school buses as defined in paragraph (55) of Code Section 40-1-1, of the current and prior model year acquired by the dealer within 12 months prior to the effective date of the termination so long as such motor vehicles have been acquired from the franchisor or from another dealer of the franchisor of the same line-make and in the normal course of business and so long as such motor vehicles have not been altered, damaged, or materially changed while in the dealer's possession. Any new motor vehicle repurchased by the franchisor shall be repurchased at the net cost to the dealer. For purposes of this paragraph, a motor vehicle shall be considered new if it has less than 500 miles on the odometer and has not been issued a certificate of title. For purposes of this paragraph, a motor vehicle shall not be deemed to have been altered, damaged, or materially changed if it has been provided with original equipment or with nonoriginal equipment which does not alter, damage, or materially change the motor vehicle, such as undercoating, pinstriping, interior conditioning, or paint sealant.

(3)(A) Upon the termination, cancellation, or nonrenewal of any franchise by the franchisor or upon the termination, cancellation,

or nonrenewal of any franchise by the franchisee, the franchisor shall repurchase, at fair and reasonable compensation, from the dealer the following:

(i) Any unused, undamaged, and unsold parts which have been acquired from the franchisor, provided such parts are currently offered for sale by the franchisor in its current parts catalog and are in salable condition. Such parts shall be repurchased by the franchisor at the current catalog price, less any applicable discount;

(ii) Any supplies, equipment, and furnishings, including manufacturer or line-make signs, purchased from the franchisor or its approved source within three years of the date of termination, cancellation, or nonrenewal; and

(iii) Any special tools purchased from the franchisor within three years of the date of termination, cancellation, or nonrenewal or any special tools or other equipment which the franchisor required the dealer to purchase regardless of the time purchased.

(B) Except as provided in division (i) of subparagraph (A) of this paragraph, fair and reasonable compensation shall be the net acquisition price if the item was acquired in the 12 months preceding the effective date of the termination, cancellation, or nonrenewal; 75 percent of the net acquisition price if the item was acquired between 13 and 24 months preceding the effective date of the termination, cancellation, or nonrenewal; 50 percent of the net acquisition price if the item was acquired between 25 and 36 months preceding the effective date of the termination, cancellation, or nonrenewal; 25 percent of the net acquisition price if the item was acquired between 37 and 60 months preceding the effective date of the termination, cancellation, or nonrenewal; or fair market value if the item was acquired more than 60 months preceding the effective date of the termination, cancellation, or nonrenewal.

(4) The repurchase of any item under this subsection shall be accomplished within 60 days of the effective date of the termination, cancellation, or nonrenewal or within 60 days of the receipt of the item by the franchisor, whichever is later in time, provided the dealer has clear title to the inventory and other items or is able to convey such title to the franchisor and does convey or transfer title and possession of the inventory and other items to the franchisor.

(5) In the event the franchisor does not pay the dealer the amounts due under this subsection or subsection (h) of this Code section within the time period set forth in this subsection, the franchisor shall, in

addition to any amounts due, pay the dealer interest on such amount. This interest shall not begin to accrue until the time for payment has expired. The interest shall be computed monthly on any balance due and the monthly interest rate shall be one-twelfth of the sum of the then current *Wall Street Journal* Prime Interest Rate and 1 percentage point.

(g) If a termination or nonrenewal of a franchise is the result of a bankruptcy filing or reorganization of a franchisor or the sale or other change in the business operation of the franchisor, the franchisor shall be required to pay the fair market value of the franchise as of the date of the notice of termination or nonrenewal or 12 months prior to the date of notice of termination or nonrenewal, whichever is greater. Fair market value shall be the goodwill value of the dealer's franchise in the dealer's community or territory. In addition, if a termination or nonrenewal of a franchise is the result of a bankruptcy filing or reorganization of a franchise or the sale or other change in the business operation of the franchisor, the franchisor shall also be required to reimburse the dealer for the cost of facility upgrades and renovations required by the franchisor within two years prior to termination or nonrenewal. Termination assistance provided for in this subsection shall be in addition to repurchase obligations otherwise set forth in this Code section.

(h) Within 60 days of the termination, cancellation, or nonrenewal of any franchise by the franchisor, the franchisor shall commence to reimburse the dealer for one year of the dealer's reasonable cost to rent or lease the dealership's facility or location or for the unexpired term of the lease or rental period, whichever is less, or, if the dealer owns the facility or location, for the equivalent of one year of the reasonable rental value of the facilities or location. If more than one franchise is being terminated, canceled, or not renewed, the reimbursement shall be prorated equally among the different franchisors. However, if a franchise is terminated, canceled, or not renewed but the dealer continues in business at the same location under a different franchise agreement, the reimbursement required by this subsection shall not be required to be paid. The provisions of this subsection shall not apply if the dealer is convicted of any criminal offense which conviction is cause of the termination, cancellation, or nonrenewal. In addition, any reimbursement due under this subsection shall be reduced by any amount received by the dealer by virtue of the dealer leasing, subleasing, or selling the facilities or location during the year immediately following the termination, cancellation, or nonrenewal. If reimbursement is made under this subsection, the franchisor is entitled to possession and use of the facilities or location for the period covered by such reimbursement.

(i) If, in an action for damages under this Code section, the franchisor fails to prove that there was good cause for the franchise termina-

tion, cancellation, or nonrenewal, then the franchisor may pay the dealer an amount equal to the value of the dealership as an ongoing business, at which time the franchisor shall receive any title to the dealership facilities which the dealer may have and the franchisee shall surrender his franchise agreement to the franchisor. If the dealer receives an amount equal to the value as an ongoing business, the dealer shall have no other recovery from the franchisor absent a showing such as would warrant punitive damages under Code Section 10-1-623.

(j) Without limitation as to factors which may constitute or indicate a lack of good cause, no termination shall be considered to be for good cause:

(1) If such termination relates to the death or disability of an owner and the franchisor has not complied with Code Section 10-1-652; or

(2) If such termination relates to a change in ownership or management and the franchisor has not complied with Code Section 10-1-653.

(k) All procedures, protections, and remedies afforded to a motor vehicle dealer under this Code section shall be available to a motor vehicle distributor whose distributor agreement is terminated, canceled, not renewed, modified, or replaced by a manufacturer or an importer. (Code 1981, § 10-1-651, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2000, p. 1589, § 3; Ga. L. 2010, p. 988, § 7/HB 1072.)

The 2010 amendment, effective June 4, 2010, substituted "in light of existing circumstances, including but not limited to current and forecasted economic conditions, provided the following conditions are satisfied" for "if" at the end of the introductory paragraph of subsection (c); in subparagraph (f)(1)(A), in the first sentence, substituted "any new and undamaged motor vehicles of the current and one year prior model year and acquired" for "any new and unused motor vehicles of the current model year and any new and unused motor vehicles acquired" near the beginning and substituted "dealer of the same line make in the ordinary course of business" for "dealer of the franchisor" near the end, and, in the second and third sentences, deleted "and unused" following "new"; in subparagraph (f)(1)(B), deleted "demonstration motor vehicles of the current model year and" following "shall repurchase" near the beginning of the first sentence; in paragraph (f)(2), in the first sentence, substituted "undamaged motor vehicles" for "unused motor vehicles" near the beginning, inserted "and prior" and inserted "acquired by the dealer within 12 months prior to the effective date of the termination" near the middle, and, in the second and third sentences, deleted "and unused" following "new"; in paragraph (f)(5), substituted "subsection (h)" for "subsection (g)" in the first sentence; added subsection (g); and redesignated former subsections (g) through (j) as present subsections (h) through (k), respectively.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2010, "line-make" was substituted for "line make" in the first sentence of subparagraph (f)(1)(A).

Editor's notes. — Ga. L. 2010, p. 988, § 1, not codified by the General Assembly, provides: "WHEREAS, the General As-

sembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

Part 5

Motor Vehicle Fair Practices

10-1-661. "Coerce" defined; delivery of motor vehicles; modification of facilities; transfer of sales contracts; warranties.

(a) For purposes of this Code section, the term "coerce" means to compel or attempt to compel by threat or use of force or to fail to act in good faith in performing or complying with any term or provision of a franchise or dealer agreement.

(b) No franchisor shall require, attempt to require, coerce, or attempt to coerce any dealer in this state:

(1) To order or accept delivery of any new motor vehicle, part, or accessory thereof, equipment, or any other commodity not required by law which shall not have been voluntarily ordered by the dealer, except that this paragraph does not affect any terms or provisions of a franchise requiring dealers to market a representative line of those motor vehicles which the franchisor is publicly advertising;

(2) To order or accept delivery of any new motor vehicle with special features, accessories, or equipment not included in the list price of such new motor vehicle as publicly advertised by the franchisor;

(3) To refrain from participation in the management of, investment in, or the acquisition of any other line of new motor vehicle or related products. However, this paragraph does not apply unless the dealer maintains a reasonable line of credit for each make or line of new motor vehicle, the dealer remains in compliance with any reasonable facilities requirements of the franchisor, the dealer provides acceptable sales performance, and no change is made in the principal management of the dealer;

(4) To expand, construct, or significantly modify facilities without assurances that the franchisor will provide a reasonable supply of new motor vehicles within a reasonable time so as to justify such an expansion in light of the market and economic conditions;

(5) To sell, assign, or transfer any retail installment sales contract obtained by such dealer in connection with the sale by such dealer in

this state of new motor vehicles to a specified finance company or class of such companies or to any other specified persons;

(6) To provide warranty or other services for the account of franchisor, except as provided in Part 3 of this article, the "Motor Vehicle Warranty Practices Act";

(7) To acquire any line-make of motor vehicle or to give up, sell, or transfer any line-make of motor vehicle which has been acquired in accordance with this article once such dealer has notified the franchisor that it does not desire to acquire, give up, sell, or transfer such line-make or to retaliate or take any adverse action against a dealer based on such desire; or

(8) To construct, renovate, or maintain exclusive facilities, personnel, or showroom area dedicated to a particular line-make if the imposition of such a requirement would be unreasonable in light of the existing circumstances, including the franchisor's reasonable business considerations, present economic and market conditions, and forecasts for future economic and market conditions in the dealer's retail territory. The franchisor shall have the burden of proof to demonstrate that its demand for exclusivity is justified by reasonable business considerations and reasonable in light of the dealer's circumstances, but this provision shall not apply to a voluntary agreement when separate and adequate consideration was offered and accepted, provided that the renewal of a franchise agreement shall not by itself constitute separate and adequate consideration. The franchisor shall have the burden of proof to show that the dealer has entered into a voluntary, noncoerced agreement regarding exclusivity. (Code 1981, § 10-1-661, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1994, p. 97, § 10; Ga. L. 1999, p. 1194, § 6; Ga. L. 2010, p. 988, § 8/HB 1072.)

The 2010 amendment, effective June 4, 2010, added subsection (a); redesignated former subsection (a) as present subsection (b); deleted "or" at the end of present paragraph (b)(6); substituted "; or" for a period at the end of present paragraph (b)(7); added paragraph (b)(8); and deleted former subsection (b), which read: "No action shall in any way be based on this Code section with respect to acts occurring prior to July 1, 1983."

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2010, "line-make" was substituted for "line make" three times in paragraph (b)(7) and in the first sentence of paragraph (b)(8).

Editor's notes. — Ga. L. 2010, p. 988, § 1, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

10-1-662. Unlawful activities by franchisors.

(a) It shall be unlawful for any franchisor:

(1) To delay, refuse, or fail to deliver new motor vehicles or new motor vehicle parts or accessories in a reasonable time and in reasonable quantity if such vehicles, parts, or accessories are publicly advertised as being available for immediate delivery. This paragraph is not violated, however, if such failure is caused by acts or causes beyond the control of the franchisor;

(2) To obtain money, goods, services, or any other benefit from any other person with whom the dealer does business, on account of, or in relation to, the transaction between the dealer and such other person, other than as compensation for services rendered, unless such benefit is promptly accounted for and transmitted to the dealer;

(3) To release to any outside party, except under subpoena or as otherwise required by law or in an administrative, judicial, or arbitration proceeding involving the franchisor or dealer, any business, financial, or personal information which may be from time to time provided by the dealer to the franchisor, without the express written consent of the dealer;

(4) To resort to or to use any false or intentionally deceptive advertisement in the conduct of business as a franchisor in this state;

(5) To make any false or intentionally deceptive statement, either directly or through any agent or employee, in order to induce any dealer to enter into any agreement or franchise or to take any action which is prejudicial to that dealer or that dealer's business;

(6) To require any dealer to assent prospectively to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability to be imposed by law or to require any controversy between a dealer and a franchisor to be referred to any person other than the duly constituted courts of the state or the United States if such referral would be binding upon the dealer, provided that this Code section shall not prevent any dealer from entering into a valid release agreement with the franchisor;

(7) To fail to observe good faith in any aspect of dealings between the franchisor and the dealer;

(8) To deny any dealer the right of free association with any other dealer for any lawful purposes;

(9) To engage in any predatory practice or discrimination against any dealer;

(10) To propose or make any material change in any franchise agreement without giving the dealer written notice by certified mail

or statutory overnight delivery of such change at least 60 days prior to the effective date of such change;

(11) To cancel a franchise or to take any adverse action against a dealer based in whole or in part on the failure of the dealer to meet the reasonable performance criteria established by the franchisor in light of existing circumstances, including but not limited to current and forecasted economic conditions, or when that failure is due to the failure of the franchisor to supply, within a reasonable period of time, new motor vehicles ordered by or allocated to the dealer;

(12) To offer to sell or lease or to sell or lease any new motor vehicle or accessory to any dealer at a lower actual price therefor than the actual price offered to any other dealer for the same model vehicle similarly equipped or same accessory or to use any device, including but not limited to an incentive, sales promotion plan, or other similar program, which results in a lower actual price of a vehicle or accessory being offered to one dealer and which is not offered to other dealers of vehicles of the same line-make or the same accessory;

(13) To conduct an audit, investigation, or inquiry of any dealer or dealership as to any activity, transaction, conduct, or other occurrence which took place or as to any promotion or special event which ends more than one year prior to such audit, investigation, or inquiry or to base any decision adverse to the dealer or dealership on any activity, transaction, conduct, or other occurrence which took place or as to any promotion or special event which ends more than one year prior to such decision or which took place any time prior to the period of time covered by such audit, investigation, or inquiry or to apply the results of an audit, investigation, or inquiry to any activity, transaction, conduct, or other occurrence which took place any time prior to the time covered by such audit, investigation, or inquiry;

(14) To charge back to, deduct from, or reduce any account of a dealer or any amount of money owed to a dealer by a franchisor any amount of money the franchisor alleges is owed to such franchisor by such dealer as a result of an audit, investigation, or inquiry of such dealer or based upon information obtained by the franchisor through other resources which relates to any transaction that occurred more than 12 months prior to notice to the dealer of the charge back or deduction, but rather if a franchisor alleges that a dealer owes such franchisor any amount of money as a result of an audit, investigation, or inquiry, such franchisor shall send a notice to such dealer for such amount and the dealer shall have not less than 30 days to contest such amount or remit payment;

(15) To deny, delay payment for, restrict, or bill back a claim by a dealer for payment or reimbursement for warranty service or parts,

incentives, hold-backs, special program money, or any other amount owed to such dealer unless such denial, delay, restriction, or bill back is the direct result of a material defect in the claim which affects the validity of the claim;

(16) To engage in business as a dealer or to manage, control, or operate, or own any interest in a dealership either directly or indirectly, if the primary business of such dealer or dealership is to perform repair services on motor vehicles, except motor homes, pursuant to a manufacturer's or franchisor's warranty;

(17) To refuse to allow, to limit, or to restrict a dealer from maintaining, acquiring, or adding a sales or service operation for another line-make of motor vehicles at the same or expanded facility at which the dealer currently operates a dealership unless the franchisor can prove by a preponderance of the evidence that such maintenance, acquisition, or addition will substantially impair the dealer's ability to adequately sell or service such franchisor's motor vehicles;

(18) To directly or indirectly condition a franchise agreement or renewal of a franchise agreement, addition of a line-make, approval of relocation, or approval of a sale or transfer on the dealer's or prospective dealer's willingness to enter into a site control agreement; provided, however, that this paragraph shall not apply to a voluntary agreement when separate and adequate consideration is paid to the dealer. The franchisor shall have the burden of proof to show the voluntary, noncoerced acceptance of the site control agreement by the dealer; or

(19) To charge back, withhold payment, deny vehicle allocation, or take other adverse action against a dealer when a new vehicle sold by the dealer has been exported to a foreign country unless the franchisor can demonstrate that the dealer knew or reasonably should have known that the customer intended to export or resell the new vehicle. There shall be a rebuttable presumption that the dealer had no such knowledge if the vehicle is titled or registered in any state in this country.

(b) No action shall in any way be based on this Code section with respect to acts occurring prior to July 1, 1983. (Code 1981, § 10-1-662, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1996, p. 1058, § 2; Ga. L. 1999, p. 1194, § 7; Ga. L. 2000, p. 1589, § 3; Ga. L. 2010, p. 988, § 9/HB 1072.)

The 2010 amendment, effective June 4, 2010, in paragraph (a)(11), substituted "reasonable performance criteria established by the franchisor in light of existing circumstances, including but not limited to current and forecasted economic conditions, or when" for "performance goals of the manufacturer when"; in paragraph

(a)(14), inserted "or based upon information obtained by the franchisor through other resources which relates to any transaction that occurred more than 12 months prior to notice to the dealer of the charge back or deduction" near the middle; deleted "or" at the end of paragraph (a)(16); in paragraph (a)(17), inserted "to" in two places, inserted "maintaining," near the beginning, inserted "maintenance," near the end, inserted two commas, and substituted a semicolon for a period at the end; and added paragraphs (a)(18) and (a)(19).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2010, "line-make" was substituted for "line make" near the end of paragraph (a)(12), in the middle of paragraph (a)(17), and in the first sentence of paragraph (a)(18).

Editor's notes. — Ga. L. 2010, p. 988, § 1, not codified by the General Assembly, provides: "WHEREAS, the General Assembly desires to reaffirm the legislative findings and declarations set forth in Code Section 10-1-621 and to make changes to the Georgia Motor Vehicle Franchise Practices Act in an effort to promote the stability of franchised motor vehicle dealerships in this state, thereby maintaining necessary reliable services to the consuming public, maintaining full and fair competition among dealers in the public interest, and providing continued employment to the citizens of this state."

10-1-664. Establishing a new dealership or relocating an existing dealership in the market area of an existing dealership; notice; petitions to enjoin or prohibit.

JUDICIAL DECISIONS

Dealership. — Franchisee did not have standing to seek to enjoin the establishment of a competing dealership within eight miles of the franchisee's service center because: (1) for purposes of the statute, the franchisee's relevant market area was the area within eight miles of an existing dealership; (2) "dealership" meant the "person" of the corporate franchisee; (3) the franchisee's principal place of business and registered office were at a location other than the service center, which location was more than eight miles from the new dealership's proposed location; so, (4) under the plain language of O.C.G.A. § 10-1-664(b), the service center was not, by definition, an existing dealership in whose relevant market area the franchisor intended to establish a new dealership since, under O.C.G.A. § 10-1-622(1) and (2)(A), "dealership" or "dealer" was defined as the "person," which in this case was a corporation, and a corporate "dealership" or "dealer" was not defined according to the corporation's facilities. WMW, Inc. v. Am. Honda Motor Co., 311 Ga. App. 1, 714 S.E.2d 689 (2011).

Anti-encroachment provision construed. — Under the Georgia Motor Vehicle Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., a corporate dealership's relevant market area, the area for which the dealer has standing to resist competition by a new or relocated dealership of the same franchisor, is the area located within an eight-mile radius of where a dealer qualified as such because the dealer is engaged in the business of selling new motor vehicles, sells those vehicles, or when a dealer qualified as such because the dealer engages exclusively in the repair of motor vehicles. WMW, Inc. v. Am. Honda Motor Co., 291 Ga. 683, 733 S.E.2d 269 (2012).

ARTICLE 22A

MARINE MANUFACTURERS

10-1-677. Termination of contractual relationship between dealer and manufacturer.

JUDICIAL DECISIONS

Dismissal proper. — Trial court's dismissal of a limited liability company's action against a corporation to recover damages pursuant to the marine manufacturers statute, O.C.G.A. § 10-1-677(e), was warranted based on the forum selection and mediation provisions of the parties' dealer agreement; the LLC (1) knowingly signed the agreement and was bound by the forum selection clause, (2) failed to allege in its complaint that it had complied with the mediation provision of the agreement prior to filing the lawsuit, and, (3) absent any evidence of fraud, agreed to be bound by the mediation provision upon signing the agreement. Houseboat Store, LLC v. Chris-Craft Corp., 302 Ga. App. 795, 692 S.E.2d 61 (2010).

ARTICLE 27

TRADE SECRETS

Law reviews. — For article, "Protecting Trade Secrets and Confidential Information in Georgia," see 60 Mercer L. Rev. 533 (2009). For article, "Intellectual Property Checklist for Marketing the Recording Artist Online," see 18 J. Intell. Prop. L. 541 (2011).

10-1-760. Short title.

Law reviews. — For annual survey of law on business associations, see 62 Mercer L. Rev. 41 (2010).

JUDICIAL DECISIONS

Superseding other tort, restitutionary laws. — Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., generally supersedes conflicting tort, restitutionary, and other laws of Georgia providing civil remedies for misappropriation of a trade secret. Prof'l Energy Mgmt. v. Necaise, 300 Ga. App. 223, 684 S.E.2d 374 (2009).

Trial court manifestly abused the court's discretion when the court granted equitable relief to a limited liability company (LLC) because there was no finding that the drawings a company used were trade secrets as defined by the Georgia Trade Secrets Act (GTSA), O.C.G.A. § 10-1-761, and by using O.C.G.A. § 9-5-1 to provide the LLC the same relief based on the same allegations it would have received had the drawings qualified as trade secrets, the trial court undermined the exclusivity of the GTSA; the key inquiry was whether the same factual allegations of misappropriation were being used to obtain relief outside the GTSA, and since the trial court's award of general equitable relief under O.C.G.A. § 9-5-1 was based on the same conduct as the GTSA claim, i.e, the misappropriation of the drawings, such relief was pre-

empted by O.C.G.A. § 10-1-767(a). Robbins v. Supermarket Equip. Sales, LLC, 290 Ga. 462, 722 S.E.2d 55 (2012).

Personal knowledge gained during employment.

Because a nonsolicit/noncompete agreement was overly broad, and because the evidence was insufficient to create a genuine issue of fact as to whether a former employee or a competitor misappropriated a trade secret, or solicited the former employer's employees or customers, the former employee and the competitor were entitled to summary judgment in the former employer's action under O.C.G.A. § 10-1-760 et seq. Wachovia Ins. Servs. v. Fallon, 299 Ga. App. 440, 682 S.E.2d 657 (2009).

10-1-761. Definitions.

Law reviews. — For article, "Must Government Contractors 'Submit' to Their Own Destruction?: Georgia's Trade Secret Disclosure Exemption and United HealthCare of Georgia, Inc. v. Georgia Department of Community Health," see 60 Mercer L. Rev. 825 (2009). For annual survey of labor and employment law, see 61 Mercer L. Rev. 213 (2009).

JUDICIAL DECISIONS

Computer software.

In a suit alleging misappropriation of trade secrets, software developer's claims that a subsequent provider of services to the client for whom the software was developed violated the Georgia Trade Secrets Act, O.C.G.A. § 10-1-76, by using software given to it by the client after the client ended the software purchasing and servicing relationship with the developer were properly dismissed; the complaint provided no facts from which it could be inferred that the subsequent servicer knew or should have known that the client had misappropriated the developer's trade secrets. S. Nuclear Operating Co. v. Elec. Data Sys. Corp., No. 07-14232, 2008 U.S. App. LEXIS 8571 (11th Cir. Apr. 14, 2008) (Unpublished).

Customer lists.

Home healthcare and hospice services provider had satisfied the provider's burden of establishing that the provider's referral log and workbook containing doctor referral statistics constituted trade secrets under O.C.G.A. § 10-1-761(4) since the documents contained valuable, proprietary information uniquely known to the provider, the information was not publicly available, the information, which the provider collected, evaluated, analyzed, and arranged, enabled the provider's employees to make informed, fact-based decisions on where to focus their business solicitation efforts, and the provider undertook reasonable efforts to maintain the confidentiality of the documents. Amedisys Holding, LLC v. Interim Healthcare of Atlanta, Inc., 793 F. Supp. 2d 1302 (N.D. Ga. 2011).

Because the real estate partnerships failed to demonstrate that the partnerships derived economic value from the secrecy of their investor lists in accordance with O.C.G.A. § 10-1-761(4)(A), the lists did not constitute a trade secret; accordingly, the trial court erred by granting summary judgment to the partnerships and denying an investment manager's motion. Sutter Capital Mgmt., LLC v. Wells Capital, Inc., 310 Ga. App. 831, 714 S.E.2d 393 (2011).

Customer database. — Although the trial court erred by enforcing a restrictive covenant in a former office manager's employment contract since the contract was unenforceable as overbroad because the contract failed to properly limit the territory to which the contract applied, the trial court properly held that the former employer's customer database constituted a trade secret under O.C.G.A. § 10-1-761(4); there was sufficient evidence that the former employer made a reasonable effort to maintain the secrecy of the database by not publishing the database, having established company-wide policies to protect that information from disclosure to third-parties, by counseling company employees regard-

ing those policies, and by limiting access to the database. Paramount Tax & Accounting, LLC v. H & R Block Eastern Enters., 299 Ga. App. 596, 683 S.E.2d 141 (2009).

Drawings. — Trial court manifestly abused the court's discretion when the court granted equitable relief to a limited liability company (LLC) because there was no finding that the drawings a company used were trade secrets as defined by the Georgia Trade Secrets Act (GTSA), O.C.G.A. § 10-1-761, and by using O.C.G.A. § 9-5-1 to provide the LLC the same relief based on the same allegations it would have received had the drawings qualified as trade secrets, the trial court undermined the exclusivity of the GTSA; the key inquiry was whether the same factual allegations of misappropriation were being used to obtain relief outside the GTSA, and since the trial court's award of general equitable relief under O.C.G.A. § 9-5-1 was based on the same conduct as the GTSA claim, i.e., the misappropriation of the drawings, such relief was preempted by O.C.G.A. § 10-1-767(a). Robbins v. Supermarket Equip. Sales, LLC, 290 Ga. 462, 722 S.E.2d 55 (2012).

"Misappropriation."

Former employee misappropriated a home healthcare and hospice services provider's trade secrets when the employee sent the referral logs to the employee's personal email account when, based on the timing of the transmission, the employee did not need the referral log information to complete a task for the provider's supervisor; the employee's testimony to the contrary was untruthful. Amedisys Holding, LLC v. Interim Healthcare of Atlanta, Inc., 793 F. Supp. 2d 1302 (N.D. Ga. 2011).

Former employee had not misappropriated a home healthcare and hospice services provider's trade secrets after the employee's credible testimony established that the employee inadvertently failed to return a workbook after leaving the provider and did not, and had no intent to, use the workbook to compete against the provider. Amedisys Holding, LLC v. Interim Healthcare of Atlanta, Inc., 793 F. Supp. 2d 1302 (N.D. Ga. 2011).

Former employer's misappropriation of trade secrets claim failed because the former employer presented only circumstantial evidence to support the employer's allegation that the former employee disclosed or used the employer's trade secrets, while the employee testified unequivocally that the employee did not use or disclose any trade secrets and presented evidence showing how the employee's new company could have independently bid upon the jobs at issue. Contract Furniture Refinishing & Maint. Corp. v. Remanufacturing & Design Group, LLC, 317 Ga. App. 47, 730 S.E.2d 708 (2012).

Pricing data of bidder. — Bidder on a public project failed to provide any evidence to support the bidder's claim that the detailed pricing information in the bidder's unredacted price proposal would enable a competitor to deduce how the bidder designed the bidder's systems and, therefore, merited protection under the trade secrets exemption to the Open Records Act, O.C.G.A. § 50-18-72(b)(1). State Rd. & Tollway Auth. v. Elec. Transaction Consultants Corp., 306 Ga. App. 487, 702 S.E.2d 486 (2010).

10-1-762. Injunctive relief.

JUDICIAL DECISIONS

Injunction blocking use of misappropriated trade secret appropriate. — A non-compete clause in a Software Agreement between an employer and employee was unenforceable as a restraint of trade under Ga. Const. 1983, Art. III, Sec. VI, Para. V(c), because it was unlimited as to time and territory. However, under O.C.G.A. § 10-1-762(d), the employee was prohibited from using a software version that incorporated the employer's trade secrets and confidential information, re-

gardless of the non-compete clause. Coleman v. Retina Consultants, P.C., 286 Ga. 317, 687 S.E.2d 457 (2009).

RESEARCH REFERENCES

ALR. — Applicability of inevitable disclosure doctrine barring employment of competitor's former employee, 36 ALR6th 537.

10-1-763. Recovery of damages.

RESEARCH REFERENCES

ALR. — Applicability of inevitable disclosure doctrine barring employment of competitor's former employee, 36 ALR6th 537.

10-1-764. Award of attorneys' fees.

RESEARCH REFERENCES

ALR. — Applicability of inevitable disclosure doctrine barring employment of competitor's former employee, 36 ALR6th 537.

10-1-767. Applicability of article.

JUDICIAL DECISIONS

Federal preemption.

Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., generally supersedes conflicting tort, restitutionary, and other laws of Georgia providing civil remedies for misappropriation of a trade secret. Prof'l Energy Mgmt. v. Necaise, 300 Ga. App. 223, 684 S.E.2d 374 (2009).

Preemption of common law claims.

In a case alleging misappropriation of confidential information and trade secrets, and breach of confidentiality agreements, a district court did not err in finding that the Georgia Trade Secrets Act of 1990, O.C.G.A. § 10-1-760 et seq., preempted the common law claims. FERCO Enters. v. Taylor Recycling Facility, LLC, No. 07-15224, 2008 U.S. App. LEXIS 18967 (11th Cir. Aug. 29, 2008) (Unpublished).

Trial court manifestly abused the court's discretion when the court granted equitable relief to a limited liability company (LLC) because there was no finding that the drawings a company used were trade secrets as defined by the Georgia Trade Secrets Act (GTSA), O.C.G.A. § 10-1-761, and by using O.C.G.A. § 9-5-1 to provide the LLC the same relief based on the same allegations it would have received had the drawings qualified as trade secrets, the trial court undermined the exclusivity of the GTSA; the key inquiry was whether the same factual allegations of misappropriation were being used to obtain relief outside the GTSA, and since the trial court's award of general equitable relief under O.C.G.A. § 9-5-1 was based on the same conduct as the GTSA claim, i.e, the misappropriation of the drawings, such relief was preempted by O.C.G.A. § 10-1-767(a). Robbins v. Supermarket Equip. Sales, LLC, 290 Ga. 462, 722 S.E.2d 55 (2012).

Breach of fiduciary duty claim not preempted. — Trial court erred in dismissing employer's claims for breach of fiduciary duty, solicitation of customers, appropriation of tangible property, and breach of a nondisclosure agreement as preempted by the Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., because

these claims alleged conduct that did come within the Act. Prof'l Energy Mgmt. v. Necaise, 300 Ga. App. 223, 684 S.E.2d 374 (2009).

ARTICLE 34

IDENTITY THEFT

Law reviews. — For article, "Limiting Law Firm Exposure to HITECH Act Liability: Do You Know Where Your Client's Protected Health Information Is?," see 15 (No. 6) Ga. St. B.J. 24 (2010).

For note, "The Online Zoom Lens: Why Internet Street-Level Mapping Technologies Demand Reconsideration of the Modern-Day Tort Notion of 'Public Privacy'," see 43 Ga. L. Rev. 575 (2009).

CHAPTER 2

WEIGHTS AND MEASURES

Article 2
Certified Public Weighers

Sec.
10-2-42. Duration of license; fees; cost of seals.

ARTICLE 1

GENERAL PROVISIONS

10-2-2. Recognized systems of weights and measures.

JUDICIAL DECISIONS

Cited in Gaudlock v. State, 310 Ga. App. 149, 713 S.E.2d 399 (2011).

ARTICLE 2

CERTIFIED PUBLIC WEIGHERS

10-2-42. Duration of license; fees; cost of seals.

Certified public weighers shall be licensed for a period of one year beginning on July 1 and ending on June 30, next. A fee of $15.00 shall be paid to the Commissioner by each person so licensed at the time application is filed. A fee of $15.00 shall be required for each renewal of a license as a certified public weigher. In addition thereto, the applicant shall pay the actual cost of seals required under this article. Any fees collected pursuant to this Code section shall be retained pursuant to the

provisions of Code Section 45-12-92.1. (Ga. L. 1949, p. 1179, § 10; Ga. L. 1956, p. 334, § 3; Ga. L. 2010, p. 9, § 1-27/HB 1055.)

The 2010 amendment, effective May 12, 2010, substituted "$15.00" for "$5.00" in the second and third sentences and added the last sentence.

CHAPTER 3

NOTES AND OTHER EVIDENCES OF DEBT

10-3-3. Certain notes or contracts for patent rights, copyrights, or proprietary rights — Consideration to be stated.

Law reviews. — For article, "Intellectual Property Checklist for Marketing the Recording Artist Online," see 18 J. Intell. Prop. L. 541 (2011). For article, "Clearing the Way: Acquiring Rights and Approvals for Music Use in Media Applications," see 18 J. Intell. Prop. L. 561 (2011).

For comment, "Pay What You Like — No, Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses," see 58 Emory L.J. 1495 (2009).

CHAPTER 4

WAREHOUSEMEN

Article 1

State Licensed and Bonded Warehouses

Sec.
10-4-12. Bond required; additional bond.
10-4-15. Inspections of warehouses.
10-4-17. License fees.
10-4-31. Publishing lists of licensed and bonded warehouses, license terminations, and findings as to violations.

Article 3

Tobacco Warehousing

Part 1

Leaf Tobacco Sales and Storage

10-4-101. Licenses for flue-cured leaf tobacco auction sales; "clean-up" sale licenses.
Sec.
10-4-115. Nonauction tobacco dealers licensed; bond or trust fund agreement; records and reports; certified public weighers provided; penalty.

Part 2

Carry-over Leaf Tobacco Storage and Sale

10-4-142. Licenses for carry-over tobacco services.

Article 5

Self-Service Storage Facilities

10-4-210. Short title.
10-4-211. Definitions.
10-4-212. Lien of owner of self-service storage facility upon property located at facility; priority; attachment.

Sec.
10-4-213. Enforcement of lien without judicial intervention.
10-4-214. Compliance with Servicemembers Civil Relief Act; right of parties to create additional rights, duties, and obligations not impaired; rights under article additional.
10-4-215. Rental agreements entered into before July 1, 2013, not affected.

ARTICLE 1

STATE LICENSED AND BONDED WAREHOUSES

10-4-12. Bond required; additional bond.

(a) Every person intending to engage in business as a warehouseman under this article shall, prior to commencing such business and periodically thereafter as the Commissioner shall require, execute and file with the Commissioner a good and sufficient bond to the state to secure the faithful performance of his or her obligation as a warehouseman under the terms of this article and the rules and regulations prescribed under this article, such bond to be computed in direct ratio to the licensed storage capacity of the warehouse bonded. The bond shall be executed by a surety corporation authorized to transact business in this state and approved by the Commissioner. Such bond shall be upon forms prescribed by the Commissioner. Any and all bond applications shall be accompanied by a certificate of "good standing" issued by the Commissioner of Insurance. If any company issuing a bond shall be removed from doing business in this state, it shall be the duty of the Commissioner of Insurance to notify the Commissioner of Agriculture within 30 days. The Commissioner shall have authority to fix the bond for any part of licensed storage capacity of the warehouse being used; but in no event shall the amount of the bond be required to exceed 15 percent of the value of the products stored and the bond shall be in such form and amount and shall have such surety or sureties, subject to service of process in actions on the bonds with this state, as the Commissioner may prescribe; provided, however, the minimum bond to be posted for each warehouse shall be $20,000.00 and the maximum bond to be required for each warehouse shall be $300,000.00.

(b) If a warehouseman is also a grain dealer, the amount of the required bond shall be the greater of the bond required by subsection (a) of this Code section or the bond required under Code Section 2-9-34 for grain dealers who are not licensed under this article.

(c) Whenever the Commissioner shall determine that a previously approved bond has for any cause become insufficient, the Commissioner may require an additional bond or bonds to be given by the warehouseman concerned, conforming with the requirements of this Code section.

Unless the additional bond or bonds are given within the time fixed by a written demand therefor, or if the bond of the warehouseman is canceled, the license of such warehouseman shall be immediately revoked by operation of law without notice or hearing. Code Sections 10-4-6 and 10-4-7 shall apply to this as well as all other Code sections of this article. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 6; Ga. L. 1956, p. 688, § 1; Ga. L. 1977, p. 289, § 1; Ga. L. 1981, p. 929, § 1; Ga. L. 1983, p. 946, § 3; Ga. L. 1985, p. 645, § 2; Ga. L. 1999, p. 800, § 7; Ga. L. 2010, p. 9, § 1-28/HB 1055.)

The 2010 amendment, effective May 12, 2010, in the last sentence of subsection (a), substituted "15 percent" for "12 percent" in the middle and substituted "$300,000.00" for "$150,000.00" at the end.

10-4-15. Inspections of warehouses.

In addition to the general powers conferred by Code Section 10-4-5, the Commissioner and his or her duly authorized agents or employees shall have full power and authority to inspect public warehouses operated under this article, to inventory, and to check the agricultural products stored so as to ascertain the conditions of such products and to determine whether or not the business is conducted in such a manner as to protect the interest of persons who are storing or may store such products. The inspectors shall make sworn reports of their findings to the Commissioner, who shall hold and keep such reports in the records of his or her office. Such inspections shall be made as often as deemed necessary by the Commissioner, but not less than twice during any license period and, in addition, as often as requested by the warehouseman. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 9; Ga. L. 2011, p. 99, § 16/HB 24.)

The 2011 amendment, effective January 1, 2013, inserted "or her" near the beginning of the first sentence and near the end of the second sentence and deleted the former third sentence which read: "Such reports when sworn to shall be public records and shall be admissible as evidence." See editor's note for applicability.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

10-4-17. License fees.

Warehousemen coming under this article shall pay an annual license fee which includes all inspections in an amount based on storage capacity in an amount fixed by rule or regulation of the Commissioner. These fees shall not exceed actual cost of inspections and are inclusive. The amount paid shall be based on storage capacity and shall be at least

$600.00 and no more than $2,500.00 for grain or cotton warehouses and $600.00 to $2,500.00 for other agricultural products facilities desiring to come under this article. Each license so issued shall expire on June 30 of each year, and each application for license must be accompanied by the license fee. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 10; Ga. L. 1955, p. 261, § 1; Ga. L. 1992, p. 2553, § 1; Ga. L. 2001, p. 1070, § 3; Ga. L. 2010, p. 9, § 1-29/HB 1055.)

The 2010 amendment, effective May 12, 2010, in the third sentence, substituted "$600.00" for "$500.00" twice, substituted "$2,500.00" for "$2,000.00", and substituted "$2,500.00" for "$1,000.00", and added the last sentence.

10-4-31. Publishing lists of licensed and bonded warehouses, license terminations, and findings as to violations.

The Commissioner may publish in print or electronically the names and locations of warehouses licensed and bonded, the names and addresses of persons licensed under this article, and lists of all licenses terminated under this article and the causes therefor. Whenever it is found, under this article, that such warehouseman is not performing the duties imposed on him by this article and the rules and regulations made under this article, the Commissioner may publish in print or electronically his findings. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 18; Ga. L. 1956, p. 688, § 2; Ga. L. 2010, p. 838, § 10/SB 388.)

The 2010 amendment, effective June 3, 2010, inserted "in print or electronically" twice in this Code section.

ARTICLE 3

TOBACCO WAREHOUSING

Part 1

Leaf Tobacco Sales and Storage

10-4-101. Licenses for flue-cured leaf tobacco auction sales; "clean-up" sale licenses.

No person, real or corporate, shall operate, hold, or conduct an auction sale for the sale of flue-cured leaf tobacco within this state without first having obtained a license for the regular selling season in which the sale is made from the Commissioner of Agriculture. Each license so issued shall automatically expire at the end of the regular selling season. The regular selling season shall be deemed to have

ended at the close of business on the marketing day any regulatory group or committee shall cause any of the sets of buyers normally assigned to the Georgia flue-cured leaf tobacco auction markets to be withdrawn for the purpose of reassigning them to auction markets in other tobacco belts. The Commissioner, in his or her discretion, may issue additional licenses to warehousemen at the end of the regular selling season as he or she deems necessary and desirable for "clean-up" sales or special sales, such licenses to terminate at the conclusion of the "clean-up" or special sale. The license fee shall be $150.00 for each regular selling season with no additional fee for licenses issued for "clean-up" or special sales. Licenses shall be subject to renewal from one regular selling season to another under such rules and regulations as the Commissioner shall prescribe. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1. (Ga. L. 1960, p. 214, § 2; Ga. L. 1968, p. 1242, § 2; Ga. L. 1970, p. 4, § 1; Ga. L. 1992, p. 1023, § 1; Ga. L. 2010, p. 9, § 1-30/HB 1055.)

The 2010 amendment, effective May 12, 2010, in the fourth sentence, inserted "or her" and inserted "or she", substituted "$150.00" for "$100.00" in the fifth sentence, and added the last sentence.

10-4-115. Nonauction tobacco dealers licensed; bond or trust fund agreement; records and reports; certified public weighers provided; penalty.

(a) Any person, firm, or corporation purchasing flue-cured leaf tobacco from producers other than at auction sales shall be required to apply to and obtain from the Commissioner of Agriculture a nonauction tobacco dealer's license prior to engaging in such purchase operations. Such license shall be renewable on an annual basis. There shall be an annual fee for each such license issued by the Commissioner. The amount of such fee shall be established by the Commissioner in an amount not to exceed $150.00 per annum. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1. Each applicant for a nonauction tobacco dealer's license shall indicate in writing to the Commissioner each year before the first auction sale of the tobacco-selling season an intent to buy flue-cured leaf tobaccos from producers other than at auction in order to be eligible for a nonauction tobacco dealer's license for that selling season.

(b) Prior to the issuance or renewal of a nonauction tobacco dealer's license to an applicant or a licensee, the applicant or licensee shall post with the Commissioner a surety bond or trust fund agreement in the amount of 20 percent of the total purchases made by the applicant or licensee of flue-cured leaf tobacco from producers other than at auction

during the preceding tobacco-selling season. The bond or trust fund agreement shall guarantee the purchases made by the applicant or licensee from producers other than at auction sales and shall in no instance be less than $20,000.00 nor more than $200,000.00.

(c) Each nonauction tobacco dealer shall compile and maintain such records and periodic reports pertaining to the purchase of tobacco from producers other than at auction sales as the Commissioner may require and shall make such records and reports available for inspection by the Commissioner or his representative during any business hours.

(d) It shall be the duty of each licensed nonauction tobacco dealer to provide or have access to a certified public weigher for the weighing of tobacco purchased by a nonauction dealer from producers other than at auction sales.

(e) It shall be unlawful for any person, firm, or corporation to purchase flue-cured leaf tobacco from producers other than at auction sales without complying with this Code section. Any person violating this Code section shall be guilty of a misdemeanor. (Ga. L. 1977, p. 189, § 1; Ga. L. 2001, p. 900, § 2; Ga. L. 2010, p. 9, § 1-31/HB 1055.)

The 2010 amendment, effective May 12, 2010, in subsection (a), substituted "$150.00" for "$100.00" near the end of the fourth sentence and added the fifth sentence.

Part 2

Carry-over Leaf Tobacco Storage and Sale

10-4-142. Licenses for carry-over tobacco services.

No person, real or corporate, shall operate a service for receiving within this state flue-cured leaf tobacco for the purpose of weighing, redrying, and storing said tobacco from the year of production until the subsequent selling season for sale at that time without first having obtained a license from the Commissioner of Agriculture. Each license so issued shall automatically expire at the termination of the storage period and be subject to renewal annually under such rules and regulations as the Commissioner shall prescribe. The license fee shall be $40.00 for each year. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1. Licensed operators of flue-cured leaf tobacco auction warehouses may be licensed without cost under this part upon application to the Commissioner. This part shall not require licensing of any federal agency, its agents, or contractors who receive carry-over tobacco. (Ga. L. 1975, p. 1263, § 2; Ga. L. 2010, p. 9, § 1-32/HB 1055.)

The 2010 amendment, effective May 12, 2010, substituted "$40.00" for "$10.00" in the third sentence and added the fourth sentence.

ARTICLE 5

SELF-SERVICE STORAGE FACILITIES

10-4-210. Short title.

This article shall be known and may be cited as the "Georgia Self-service Storage Facility Act of 2013." (Ga. L. 1982, p. 2286, § 1; Code 1981, § 10-4-210, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 2013, p. 555, § 1/SB 61.)

The 2013 amendment, effective July 1, 2013, added "of 2013" at the end of this Code section.

10-4-211. Definitions.

For purposes of this article, the term:

(1) "E-mail" means an electronic message or an executable program or computer file that contains an image of a message that is transmitted between two or more computers or electronic terminals. The term includes electronic messages that are transmitted within or between computer networks.

(2) "Last known address" means the street address, post office box address, or e-mail address provided by the occupant in the latest rental agreement or the address provided by the occupant in a subsequent written notice of a change of address by hand delivery, verified mail, or e-mail.

(3) "Occupant" means a person, his or her sublessee, successor, or assign entitled to the use of the storage space at a self-service storage facility under a rental agreement, to the exclusion of others.

(4) "Owner" means the owner, operator, lessor, or sublessor of a self-service storage facility, his or her agent, or any other person authorized to manage the facility or to receive rent from an occupant under a rental agreement.

(5) "Personal property" means movable property not affixed to land and includes, but is not limited to, goods, wares, merchandise, motor vehicles, trailers, watercraft, and household items and furnishings.

(6) "Rental agreement" means any agreement or lease, written or oral, that establishes or modifies the terms, conditions, rules, or any other provisions concerning the use and occupancy of a self-service storage facility.

(7) "Self-service storage facility" means any real property designed and used for the purpose of renting or leasing individual storage space to occupants who are to have access to such for the purpose of storing and removing personal property. No occupant shall use a self-service storage facility for residential purposes. A self-service storage facility is not a warehouse within the meaning of Article 1 of this chapter, known as the "Georgia State Warehouse Act," and the provisions of law relative to bonded public warehousemen shall not apply to the owner of a self-service storage facility. A self-service storage facility is not a safe-deposit box or vault maintained by banks, trust companies, or other financial entities.

(8) "Verified mail" means certified mail, registered mail, statutory overnight delivery, or other method of mailing or delivery in which the post office or delivery service furnishes proof that the parcel was sent. (Ga. L. 1982, p. 2286, § 2; Code 1981, § 10-4-211, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 1983, p. 3, § 8; Ga. L. 2004, p. 976, § 1; Ga. L. 2013, p. 555, § 1/SB 61.)

The 2013 amendment, effective July 1, 2013, added paragraphs (1) and (8); redesignated former paragraphs (1) through (6) as present paragraphs (2) through (7), respectively; in paragraph (2), substituted "means the street address, post office box address, or e-mail address" for "means that address" near the beginning and added "by hand delivery, verified mail, or e-mail" at the end; inserted "or her" in paragraphs (3) and (4); deleted "by him" following "authorized" in paragraph (4); in paragraph (5), inserted "trailers,"; and revised punctuation in the third sentence of paragraph (7).

10-4-212. Lien of owner of self-service storage facility upon property located at facility; priority; attachment.

The owner of a self-service storage facility and his or her heirs, executors, administrators, successors, and assigns have a lien upon all personal property located at a self-service storage facility for rent, labor, or other charges, present or future, in relation to the personal property and for expenses necessary for its preservation or expenses reasonably incurred in its sale or other disposition pursuant to this article. The lien provided for in this Code section is superior to any other lien or security interest except those which are perfected and recorded prior to the date of the rental agreement in Georgia in the name of the occupant, either in the county of the occupant's last known address or in the county where the self-service storage facility is located, except any tax lien as otherwise provided by law and except any lienholder with an interest in the property of whom the owner has knowledge either through the disclosure provision of the rental agreement or through other written notice. The lien attaches as of the date the personal property is brought to the self-service storage facility. (Ga. L. 1982, p. 2286, § 3; Code 1981, § 10-4-212, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 2000, p. 136, § 10; Ga. L. 2013, p. 555, § 1/SB 61.)

The 2013 amendment, effective July 1, 2013, inserted "or her" in the first sentence.

10-4-213. Enforcement of lien without judicial intervention.

Provided that it complies with the requirements of this Code section, an owner may enforce the lien without judicial intervention. The owner shall obtain from the occupant a written rental agreement which includes the following language:

This agreement, made and entered into this _____ day of _____, ____, by and between _____, hereinafter called Owner, and _____, hereinafter called Occupant, whose last known address is _____. For the consideration hereinafter stated, Owner agrees to let Occupant use and occupy a space in the self-service storage facility, known as _____, situated in the City of _____, County of _____, State of Georgia, and more particularly described as follows: Building #_____, Space #_____, Size _____. Said space is to be occupied and used for the purposes specified herein and subject to the conditions set forth for a period of _____, beginning on the _____ day of _____, _____, and continuing month to month until terminated.

"Space," as used in this agreement, will be that part of the self-service storage facility as described above. Occupant agrees to pay Owner, as payment for the use of the space and improvements thereon, the monthly sum of $_____. Monthly installments are payable in advance on or before the first of each month, in the amount of $_____, and a like amount for each month thereafter, until the termination of this agreement.

If any monthly installment is not paid by the seventh calendar day of the month due, or if any check given in payment is dishonored by the financial institution on which it is drawn, Occupant shall be deemed to be in default.

Occupant further agrees to pay the sum of one month's fees, which shall be used as a clean-up and maintenance fund, and is to be used, if required, for the repair of any damage done to the space and to clean up the space at the termination of the agreement. In the event that the space is left in a good state of repair, and in a broom-swept condition, then this amount shall be refunded to Occupant. However, it is agreed to between the parties that Owner may set off any claims it may have against Occupant from this fund.

The space named herein is to be used by Occupant solely for the purpose of storing any personal property belonging to Occupant. Occupant agrees not to store any explosives or any highly inflammable goods or any other goods in the space which would cause danger to the space. Occupant agrees that the property will not be used for any unlawful purposes and Occupant agrees not to commit waste, nor alter, nor affix signs on the space, and to keep the space in good condition during the term of this agreement.

OWNER HAS A LIEN ON ALL PERSONAL PROPERTY STORED IN OCCUPANT'S SPACE FOR RENT, LABOR, OR OTHER CHARGES, PRESENT OR FUTURE, IN RELATION TO THE PERSONAL PROPERTY, AND FOR ITS PRESERVATION OR EXPENSES REASONABLY INCURRED IN ITS SALE OR OTHER DISPOSITION PURSUANT TO THIS AGREEMENT. PERSONAL PROPERTY STORED IN OCCUPANT'S SPACE WILL BE SOLD OR OTHERWISE DISPOSED OF IF NO PAYMENT HAS BEEN RECEIVED FOR A CONTINUOUS THIRTY-DAY PERIOD AFTER DEFAULT. IN ADDITION, UPON OCCUPANT'S DEFAULT, OWNER MAY WITHOUT NOTICE DENY OCCUPANT ACCESS TO THE PERSONAL PROPERTY STORED IN OCCUPANT'S SPACE UNTIL SUCH TIME AS PAYMENT IS RECEIVED. IF ANY MONTHLY INSTALLMENT IS NOT MADE BY THE SEVENTH CALENDAR DAY OF THE MONTH DUE, OR IF ANY CHECK GIVEN IN PAYMENT IS DISHONORED BY THE FINANCIAL INSTITUTION ON WHICH IT IS DRAWN, OCCUPANT IS IN DEFAULT FROM DATE PAYMENT WAS DUE.

I hereby agree that all notices other than bills and invoices shall be given by hand delivery, verified mail, or e-mail at the following addresses:

_____ (hand delivery)

_____ (verified mail)

_____ (e-mail).

and I further understand that I may designate to owner an agent to receive such notice by providing:

_____ (hand delivery)

_____ (verified mail)

_____ (e-mail).

For purposes of Owner's lien: "personal property" means movable property, not affixed to land, and includes, but is not limited to, goods, wares, merchandise, motor vehicles, trailers, watercraft, household items, and furnishings; "last known address" means the street

address or post office box address provided by Occupant in the latest rental agreement or the address provided by Occupant in a subsequent written notice of a change of address by hand delivery, verified mail, or e-mail.

Owner's lien is superior to any other lien or security interest, except those which are evidenced by a certificate of title or perfected and recorded prior to the date of this rental agreement in Georgia, in the name of Occupant, either in the county of Occupant's "last known address" or in the county where the self-service storage facility is located, except any tax lien as provided by law and except those liens or security interests of whom Owner has knowledge through Occupant's disclosure in this rental agreement or through other written notice. Occupant attests that the personal property in Occupant's space(s) is free and clear of all liens and secured interests except for _____. Owner's lien attaches as of the date the personal property is brought to the self-service storage facility.

Except as otherwise specifically provided in this rental agreement, the exclusive care, custody, and control of any and all personal property stored in the leased space shall remain vested in Occupant. Owner does not become a bailee of Occupant's personal property by the enforcement of Owner's lien.

If Occupant has been in default continuously for thirty (30) days, Owner may enforce its lien, provided Owner shall comply with the following procedure:

Occupant shall be notified of Owner's intent to enforce Owner's lien by written notice delivered in person, by verified mail, or by e-mail. Owner also shall notify other parties with superior liens or security interests as defined in this rental agreement. A notice given pursuant to this rental agreement shall be presumed sent when it is deposited with the United States Postal Service or the statutory overnight delivery service properly addressed with postage or delivery fees prepaid or sent by e-mail. If Owner sends notice of a pending sale of property to Occupant's last known e-mail address and does not receive a nonautomated response or a receipt of delivery to the e-mail address, Owner shall send notice of the sale to Occupant by verified mail to Occupant's last known address or to the last known address of the designated agent of the Occupant before proceeding with the sale.

Owner's notice to Occupant shall include an itemized statement of Owner's claim showing the sum due at the time of the notice and the date when the sum became due. Owner's notice shall notify Occupant of denial of access to the personal property and provide the name, street address, e-mail address, and telephone number of

Owner or its designated agent, whom Occupant may contact to respond to this notice. Owner's notice shall demand payment within a specified time, not less than fourteen (14) days after delivery of the notice. It shall state that, unless the claim is paid, within the time stated in the notice, the personal property will be advertised for public sale to the highest bidder, and will be sold at a public sale to the highest bidder, at a specified time and place.

After the expiration of the time given in Owner's notice, Owner shall publish an advertisement of the public sale to the highest bidder, once a week, for two consecutive weeks, in the legal organ for the county where the self-service storage facility is located. The sale shall be deemed commercially reasonable if at least three (3) independent bidders attend the sale at the time and place advertised. "Independent bidder" means a bidder who is not related to and who has no controlling interest in, or common pecuniary interest with, Owner or any other bidder. The advertisement shall include: a brief and general description of the personal property, reasonably adequate to permit its identification; the address of the self-service storage facility, and the number, if any, of the space where the personal property is located, and the name of Occupant; and the time, place, and manner of the public sale. The public sale to the highest bidder shall take place not sooner than fifteen (15) days after the first publication. Regardless of whether a sale involves the property of more than one Occupant, a single advertisement may be used to advertise the disposal of property at the sale. A public sale includes offering the property on a publicly accessible website that regularly conducts online auctions of personal property. Such sale shall be considered incidental to the self-storage business and no license shall be required.

If no one purchases the property at the public sale and if Owner has complied with the foregoing procedures, Owner may otherwise dispose of the property and shall notify Occupant of the action taken. Any sale or disposition of the personal property shall be held at the self-service storage facility or at the nearest suitable place to where the personal property is held or stored.

Before any sale or other disposition of personal property pursuant to this agreement, Occupant may pay the amount necessary to satisfy the lien and the reasonable expenses incurred and thereby redeem the personal property and thereafter Owner shall have no liability to any person with respect to such personal property.

A Purchaser in good faith of the personal property sold to satisfy Owner's lien takes the property free of any rights of persons against whom the lien was valid, despite noncompliance by Owner with the requirements of this agreement.

In the event of a sale, Owner may satisfy his or her lien from the proceeds of the sale. Owner shall hold the balance of the proceeds, if any, for Occupant or any notified secured interest holder. If not claimed within two years of the date of sale, the balance of the proceeds shall be disposed of in accordance with Article 5 of Chapter 12 of Title 44, the "Disposition of Unclaimed Property Act." In no event shall Owner's liability exceed the proceeds of the sale.

If the rental agreement contains a limit on the value of property stored in Occupant's storage space, the limit shall be deemed to be the maximum value of the property stored in that space.

If the property upon which the lien is claimed is a motor vehicle, trailer, or watercraft and rent and other charges related to the property remain unpaid or unsatisfied for 60 days following the maturity of the obligation to pay rent, Owner may have the property towed in lieu of foreclosing on the lien. If a motor vehicle, trailer, or watercraft is towed as authorized in this section, Owner shall not be liable for the motor vehicle, trailer, or watercraft or any damages to the motor vehicle, trailer, or watercraft once the tower takes possession of the property. (Ga. L. 1982, p. 2286, § 4; Code 1981, § 10-4-213, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 1983, p. 3, § 8; Ga. L. 1984, p. 22, § 10; Ga. L. 1992, p. 6, § 10; Ga. L. 1999, p. 81, § 10; Ga. L. 2000, p. 425, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2004, p. 976, § 2; Ga. L. 2005, p. 60, § 10/HB 95; Ga. L. 2013, p. 555, § 1/SB 61.)

The 2013 amendment, effective July 1, 2013, rewrote this Code section.

10-4-214. Compliance with Servicemembers Civil Relief Act; right of parties to create additional rights, duties, and obligations not impaired; rights under article additional.

If the rental agreement is with a service member, the owner shall comply with all terms of the Servicemembers Civil Relief Act, 50 U.S.C. § 501 et seq. Nothing in this article shall be construed as in any manner impairing or affecting the right of the parties to create additional rights, duties, and obligations in and by virtue of the rental agreement. The rights provided by this article shall be in addition to all other rights allowed by law to a creditor against his or her debtor. (Ga. L. 1982, p. 2286, § 5; Code 1981, § 10-4-214, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 2013, p. 555, § 1/SB 61.)

The 2013 amendment, effective July 1, 2013, added the first sentence and inserted "or her" in the last sentence of this Code section.

10-4-215. Rental agreements entered into before July 1, 2013, not affected.

All rental agreements entered into before July 1, 2013, and not extended or renewed after that date and the rights and duties and interests flowing from them shall remain valid and may be enforced or terminated in accordance with their terms or as permitted by any other statute or law of this state. (Ga. L. 1982, p. 2286, § 6; Code 1981, § 10-4-215, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 2013, p. 555, § 1/SB 61.)

The 2013 amendment, effective July 1, 2013, substituted "July 1, 2013" for "July 1, 1982" and made a punctuation change in this Code section.

CHAPTER 5

GEORGIA UNIFORM SECURITIES

Article 3

Registration of Securities

Sec.
10-5-25. Denying, suspending, or revoking the effectiveness of registration statement; publication of standards providing notice of conduct constituting violations; notice and hearing.

Article 6

Administration

10-5-71. Powers of Commissioner.
10-5-76. Public records; exceptions.

ARTICLE 1

GENERAL PROVISIONS

10-5-1. Short title.

JUDICIAL DECISIONS

Cited in Griffin v. State Bank, 312 Ga. App. 87, 718 S.E.2d 35 (2011); Cox v. Mayan Lagoon Estates Ltd., 319 Ga. App. 101, 734 S.E.2d 883 (2012).

RESEARCH REFERENCES

ALR. — State regulation of viatical life insurance programs, viatical settlements, and viatical investments, 28 ALR6th 281.

10-5-2. Definitions.

Law reviews. — For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B.J. 18 (2009).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
"SECURITY"

General Consideration

Cited in Golden Atlanta Site Dev., Inc. v. Tilson, 299 Ga. App. 646, 683 S.E.2d 166 (2009).

"Security"

The elements of an "investment contract", etc.

Defendant was properly convicted of violating the Georgia Securities Act of 1973 because the evidence authorized the jury to find that all three prongs of the test used to determine whether a particular scheme was an investment contract under the Securities Act, O.C.G.A. § 10-5-2(a)(26), were satisfied; the victims parted with the victims' money in anticipation of investment gains, there was a common enterprise because the victims' funds were pooled to reach the minimum amounts for participation set by the defendant, and the expectation of profits rested solely on the efforts of others. Hicks v. State, 315 Ga. App. 779, 728 S.E.2d 294 (2012).

Defendant properly convicted for violating Securities Act. — Defendant was properly convicted of violating the Georgia Securities Act of 1973 because the evidence authorized the jury to find that all three prongs of the test used to determine whether a particular scheme was an investment contract under the Securities Act, O.C.G.A. § 10-5-2(a)(26), were satisfied; the victims parted with the victims' money in anticipation of investment gains, there was a common enterprise because the victims' funds were pooled to reach the minimum amounts for participation set by the defendant, and the expectation of profits rested solely on the efforts of others. Hicks v. State, 315 Ga. App. 779, 728 S.E.2d 294 (2012).

RESEARCH REFERENCES

ALR. — State regulation of viatical life insurance programs, viatical settlements, and viatical investments, 28 ALR6th 281.

ARTICLE 2

EXEMPTIONS

10-5-11. Exempt transactions.

Law reviews. — For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B.J. 18 (2009).

10-5-12. Exemption of securities, transactions, or offers by adoption of rule or issuance of order.

Law reviews. — For annual survey of law on business associations, see 62 Mercer L. Rev. 41 (2010).

JUDICIAL DECISIONS

No merger with theft by conversion. — Trial court did not err in failing to merge the theft by conversion counts under O.C.G.A. § 16-8-3, and the securities violation counts under O.C.G.A. § 10-5-12 filed against defendant because the state had to prove separate facts to find defendant guilty of the theft by conversion offenses and the violations of the Georgia Securities Act, O.C.G.A. § 10-5-1 et seq. Furthermore, the securities violation counts were complete before the theft conversion occurred. Lavigne v. State, 299 Ga. App. 712, 683 S.E.2d 656 (2009).

Subscription agreement's disclosure barred recovery. — Summary judgment for corporation, the corporation's chief executive officer (CEO), and the corporation's chief financial officer on an investor's claims pursuant to the Securities Act was proper; although the investor claimed that the investor had been misled by the CEO's promise that the investor would receive one-third of the corporation's stock in return for the investment, it was undisputed that a subscription agreement which the investor admittedly received and executed did not provide for the interest the investor claimed the investor was orally promised by the CEO, but rather, stated that the investor was receiving, at most, 8.16 percent of the outstanding common stock. Given that the subscription agreement so starkly contradicted the CEO's alleged promise, the investor knew that the latter was untrue, and the investor was not entitled to recover for the alleged violation of the Securities Act. Fernandez v. WebSingularity, Inc., 299 Ga. App. 11, 681 S.E.2d 717 (2009).

Indirect reliance. — When plaintiff outside investors relied on statements of plaintiff inside investor, not the financials prepared by defendant, the former chief financial officer (CFO) of plaintiff company, such "indirect reliance" precluded the outside investors' claims of fraud and securities fraud under Georgia law against the CFO. TSG Water Res., Inc. v. D'Alba & Donovan Certified Pub. Accountants, P.C., No. 06-11803, 2007 U.S. App. LEXIS 29724 (11th Cir. Dec. 20, 2007) (Unpublished).

No reliance found. — Because plaintiff limited liability company (LLC1), who sold its interest in another limited liability company (LLC2) to buyers (the other members of LLC2), could not have managed LLC2 or replaced the buyers if it had bought out the buyers under a put and call, LLC1 would have sold its interest even if it had known of defendant financier's involvement with the buyers; LLC1's claims under 15 U.S.C. § 78j(b) and O.C.G.A. § 10-5-12 against the financier failed. Ledford v. Peeples, 657 F.3d 1222 (11th Cir. 2011).

Defendant properly convicted for violating the Securities Act. — Defendant was properly convicted of violating the Georgia Securities Act of 1973 because the evidence authorized the jury to find that all three prongs of the test used to determine whether a particular scheme was an investment contract under the Securities Act, O.C.G.A. § 10-5-2(a)(26), were satisfied; the victims parted with the victims' money in anticipation of investment gains, there was a common enterprise because the victims' funds were pooled to reach the minimum amounts for participation set by the defendant, and the expectation of profits rested solely on the efforts of others. Hicks v. State, 315 Ga. App. 779, 728 S.E.2d 294 (2012).

Cited in Ledford v. Peeples, 568 F.3d 1258 (11th Cir. 2009).

10-5-13. Denial, suspension, or revocation of exemption.

Law reviews. — For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B.J. 18 (2009).

ARTICLE 3

REGISTRATION OF SECURITIES

10-5-25. Denying, suspending, or revoking the effectiveness of registration statement; publication of standards providing notice of conduct constituting violations; notice and hearing.

(a) The Commissioner may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, a registration statement if the Commissioner finds that the order is in the public interest and that:

(1) The registration statement as of its effective date or before the effective date in the case of an order denying effectiveness, an amendment under subsection (j) of Code Section 10-5-24 as of its effective date, or a report under subsection (i) of Code Section 10-5-24 is incomplete in a material respect or contains a statement that, in the light of the circumstances under which it was made, was false or misleading with respect to a material fact;

(2) This chapter or a rule adopted or order issued under this chapter or a condition imposed under this chapter has been willfully violated, in connection with the offering, by the person filing the registration statement; by the issuer, a partner, officer, or director of the issuer or a person having a similar status or performing a similar function; by a promoter of the issuer; or by a person directly or indirectly controlling or controlled by the issuer but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer; or by an underwriter;

(3) The security registered or sought to be registered is the subject of a permanent or temporary injunction of a court of competent jurisdiction or an administrative stop order or similar order issued under any federal, foreign, or state law other than this chapter applicable to the offering, but the Commissioner may not institute a proceeding against an effective registration statement under this paragraph more than one year after the date of the order or injunction on which it is based, and the Commissioner may not issue an order under this paragraph on the basis of an order or injunction issued under the securities act of another state unless the order or

injunction was based on conduct that would constitute, as of the date of the order, a ground for a stop order under this Code section;

(4) The issuer's enterprise or method of business includes or would include activities that are unlawful where performed;

(5) With respect to a security sought to be registered under Code Section 10-5-22, there has been a failure to comply with the undertaking required by paragraph (4) of subsection (b) of said Code section;

(6) The applicant or registrant has not paid the filing fee, but the Commissioner shall void the order if the deficiency is corrected; or

(7) The offering:

(A) Will work or tend to work a fraud upon purchasers or would so operate; or

(B) Has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation or promoters' profits or participations or unreasonable amounts or kinds of options; or

(C) Is being made on terms that are unfair, unjust, or inequitable.

(b) To the extent practicable, the Commissioner by rule adopted or order issued under this chapter shall publish in print or electronically standards that provide notice of conduct that violates paragraph (7) of subsection (a) of this Code section.

(c) The Commissioner may not institute a stop order proceeding against an effective registration statement on the basis of conduct or a transaction known to the Commissioner when the registration statement became effective unless the proceeding is instituted within 30 days after the registration statement became effective.

(d) The Commissioner may summarily revoke, deny, postpone, or suspend the effectiveness of a registration statement pending final determination of an administrative proceeding. Upon the issuance of the order, the Commissioner shall promptly notify each person specified in subsection (e) of this Code section that the order has been issued, the reasons for the revocation, denial, postponement, or suspension, and that within 30 days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the Commissioner within 30 days after the date of service of the order, the order becomes final. If a hearing is requested or ordered, the Commissioner, after notice of and opportunity for hearing for each person subject to the order, may modify or vacate the order or extend the order until final determination.

(e) A stop order may not be issued under this Code section without:

(1) Appropriate notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered;

(2) An opportunity for hearing; and

(3) Findings of fact and conclusions of law in a record in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(f) The Commissioner may modify or vacate a stop order issued under this Code section if the Commissioner finds that the conditions that caused its issuance have changed or that it is necessary or appropriate in the public interest or for the protection of investors. (Code 1981, § 10-5-25, enacted by Ga. L. 2008, p. 381, § 1/SB 358; Ga. L. 2010, p. 838, § 10/SB 388.)

The 2010 amendment, effective June 3, 2010, inserted "in print or electronically" in subsection (b).

ARTICLE 4

REGISTRATION OF BROKER-DEALERS, AGENTS, AND INVESTMENT ADVISORS

Law reviews. — For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B.J. 18 (2009).

10-5-34. Registration requirements for federal covered investment advisers.

Law reviews. — For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B.J. 18 (2009).

ARTICLE 5

VIOLATIONS, PENALTIES, AND CIVIL LIABILITY

Law reviews. — For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B.J. 18 (2009).

10-5-50. Unlawful practices with offer, sale, or purchase of security.

JUDICIAL DECISIONS

Standing on manipulative or deceptive device claims. — Because only plaintiff corporation sold plaintiff's interest in a company to the company's managing partners, co-plaintiffs, the corporations' principals, lacked standing on claims of securities fraud under former O.C.G.A. § 10-5-12(a)(2), against defendant managing partners' financier. Ledford v. Peeples, 605 F.3d 871 (11th Cir. 2010) (decided under former O.C.G.A. § 10-5-12).

Scienter not sufficiently pled. — Investors' reliance on defendants' positions as directors and officers, their attendance at meetings, and access to internal documents and reports was insufficient to allege a strong inference of scienter to support their securities fraud claims under O.C.G.A. § 10-5-12(a)(2), 15 U.S.C. § 78j(b), and 15 U.S.C. § 78u-4. Patel v. Patel, 761 F. Supp. 2d 1375 (N.D. Ga. Jan. 14, 2011).

10-5-51. Fraud or deceit unlawful; adoption of rule.

JUDICIAL DECISIONS

Subscription agreement's disclosure barred recovery. — Summary judgment for corporation, the corporation's chief executive officer (CEO), and the corporation's chief financial officer on an investor's claims pursuant to the Securities Act was proper; although the investor claimed that the investor had been misled by the CEO's promise that the investor would receive one-third of the corporation's stock in return for the investment, it was undisputed that a subscription agreement which the investor admittedly received and executed did not provide for the interest the investor claimed the investor was orally promised by the CEO, but rather, stated that the investor was receiving, at most, 8.16 percent of the outstanding common stock. Given that the subscription agreement so starkly contradicted the CEO's alleged promise, the investor knew that the latter was untrue, and the investor was not entitled to recover for the alleged violation of the Securities Act. Fernandez v. WebSingularity, Inc., 299 Ga. App. 11, 681 S.E.2d 717 (2009).

Failure to show fraud. — Guarantor of a bank loan could not show securities fraud by a bank based upon a consultant's representations as to the proposed imminent purchase of another bank in which the guarantor's company owned stock because the guarantor could not show either actionable misrepresentations or justifiable reliance regarding the consultant's representations. Furthermore, the consultant was not associated with the bank which made the loan to the guarantor's company. Griffin v. State Bank, 312 Ga. App. 87, 718 S.E.2d 35 (2011).

10-5-52. Civil and criminal proceedings.

Law reviews. — For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B.J. 18 (2009).

10-5-58. Enforcement of civil liability; damages.

Law reviews. — For article, "Holmes v. Grubman: The Supreme Court of Georgia Balances Financial Advisor Common Law Liability and Investor Protection," see 16 (No. 5) Ga. St. B.J. 20 (2011).

ARTICLE 6

ADMINISTRATION

10-5-71. Powers of Commissioner.

(a) The Commissioner may:

(1) Conduct public or private investigations inside or outside this state which the Commissioner considers necessary or appropriate to determine whether a person has violated, is violating, or is about to violate this chapter or a rule adopted or order issued under this chapter or to aid in the enforcement of this chapter or in the adoption of rules and forms under this chapter;

(2) Require or permit a person to testify, file a statement, or produce a record, under oath or otherwise as the Commissioner determines, as to all the facts and circumstances concerning a matter to be investigated or about which an action or proceeding is to be instituted; and

(3) Publish in print or electronically a record concerning an action, proceeding, or an investigation under or a violation of this chapter or a rule adopted or order issued under this chapter if the Commissioner determines it is necessary or appropriate in the public interest and for the protection of investors.

(b) For the purpose of an investigation under this chapter, the Commissioner or his or her designated officer may administer oaths and affirmations, subpoena witnesses, seek compulsion of attendance, take evidence, require the filing of statements, and require the production of any records that the Commissioner considers relevant or material to the investigation.

(c) If a person does not appear or refuses to testify, file a statement, produce records, or otherwise does not obey a subpoena as required by the Commissioner under this chapter, the Commissioner may refer the matter to the Attorney General or the proper district attorney, who may apply to the superior court or a court of another state to enforce compliance. The court may:

(1) Hold the person in contempt;

(2) Order the person to appear before the Commissioner;

(3) Order the person to testify about the matter under investigation or in question;

(4) Order the production of records;

(5) Grant injunctive relief, including restricting or prohibiting the offer or sale of securities or the providing of investment advice;

(6) Impose a civil penalty of not less than $5,000.00 and not greater than $50,000.00 for each violation; and

(7) Grant any other necessary or appropriate relief.

(d) This Code section does not preclude a person from applying to superior court or a court of another state for relief from a request to appear, testify, file a statement, produce records, or obey a subpoena.

(e) An individual is not excused from attending, testifying, filing a statement, producing a record or other evidence, or obeying a subpoena of the Commissioner under this chapter or in an action or proceeding instituted by the Commissioner under this chapter on the ground that the required testimony, statement, record, or other evidence, directly or indirectly, may tend to incriminate the individual or subject the individual to a criminal fine, penalty, or forfeiture. If the individual refuses to testify, file a statement, or produce a record or other evidence on the basis of the individual's privilege against self-incrimination, the Commissioner may apply to superior court to compel the testimony, the filing of the statement, the production of the record, or the giving of other evidence. The testimony, record, or other evidence compelled under such an order may not be used, directly or indirectly, against the individual in a criminal case, except in a prosecution for perjury or contempt or otherwise failing to comply with the order.

(f) At the request of the securities administrator of another state or a foreign jurisdiction, the Commissioner may provide assistance if the requesting administrator states that it is conducting an investigation to determine whether a person has violated, is violating, or is about to violate a law or rule of the other state or foreign jurisdiction relating to securities matters that the requesting administrator regulates or enforces. The Commissioner may provide the assistance by using the authority to investigate and the powers conferred by this Code section as the Commissioner determines is necessary or appropriate. The assistance may be provided without regard to whether the conduct described in the request would also constitute a violation of this chapter or other law of this state if occurring in this state. In deciding whether to provide the assistance, the Commissioner may consider whether the requesting administrator is permitted and has agreed to provide assistance reciprocally within its state or foreign jurisdiction to the Commissioner on securities matters when requested; whether compli-

ance with the request would violate or prejudice the public policy of this state; and the availability of resources and employees of the Commissioner to carry out the request for assistance.

(g) In the case of any investigation conducted under this Code section, the Commissioner may appoint an investigative agent who shall have the same investigative powers and authority as the Commissioner. The agent shall possess such qualifications as the Commissioner may require. (Code 1981, § 10-5-71, enacted by Ga. L. 2008, p. 381, § 1/SB 358; Ga. L. 2010, p. 838, § 10/SB 388.)

The 2010 amendment, effective June 3, 2010, inserted "in print or electronically" in paragraph (a)(3).

10-5-73. Cease and desist orders; denying, revoking, or conditioning exemptions for broker-dealers.

Law reviews. — For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B.J. 18 (2009).

10-5-76. Public records; exceptions.

(a) Except as otherwise provided in subsection (b) of this Code section, records obtained by the Commissioner or filed under this chapter, including a record contained in or filed with a registration statement, application, notice filing, or report, are public records and are available for public examination.

(b) The following information and documents do not constitute public information under subsection (a) of this Code section and shall be confidential:

(1) Information or documents obtained by the Commissioner in connection with an investigation under Code Section 10-5-71;

(2) Information or documents filed with the Commissioner in connection with a registration statement or exemption filing under this chapter which constitute trade secrets or commercial or financial information of a person for which that person is entitled to and has asserted a claim of confidentiality or privilege authorized by law;

(3) Any document or record specifically designated as confidential in accordance with this chapter; and

(4) Any document, record, or information designated as confidential by federal statute, rule, or regulation. (Code 1981, § 10-5-76, enacted by Ga. L. 2008, p. 381, § 1/SB 358; Ga. L. 2011, p. 752, § 10/HB 142.)

The 2011 amendment, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, substituted "Code Section 10-5-71" for "Code Section 10-5-21" in paragraph (b)(1).

10-5-79. Applicability of chapter to certain offers to purchase or sell.

Law reviews. — For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B.J. 18 (2009).

10-5-80. Consent to service of process.

Law reviews. — For article, "The Georgia Uniform Securities Act of 2008: An Analysis of Significant Changes to Georgia's Blue Sky Law," see 14 (No. 6) Ga. St. B.J. 18 (2009).

CHAPTER 5A

COMMODITIES AND COMMODITY CONTRACTS AND OPTIONS

Article 2
Enforcement

Sec.
10-5A-20. Investigations.

ARTICLE 2

ENFORCEMENT

10-5A-20. Investigations.

(a) The Commissioner at his discretion:

(1) May make such public or private investigations within or outside of this state as he deems necessary to determine whether any person has violated or is about to violate this chapter or any rule, regulation, or order under this chapter or to aid in the enforcement of this chapter or in the prescribing of rules and regulations under this chapter;

(2) May require or permit any person to file a statement in writing, under oath or otherwise as the Commissioner determines, as to all the facts and circumstances concerning the matter to be investigated; and

(3) May publish in print or electronically information concerning any violation of this chapter or any rule, regulation, or order under this chapter.

(b)(1) For the purpose of conducting any investigation as provided in this Code section, the Commissioner shall have the power to administer oaths, to call any party to testify under oath at such investigations, to require the attendance of witnesses, to require the production of books, records, and papers, and to take the depositions of witnesses; and for such purposes the Commissioner is authorized to issue a subpoena for any witness or a subpoena for the production of documentary evidence. Such subpoenas may be served by registered or certified mail or statutory overnight delivery, return receipt requested, to the addressee's business mailing address or by investigators appointed by the Commissioner or shall be directed for service to the sheriff of the county where such witness resides or is found or where the person in custody of any books, records, or papers resides or is found. The fees and mileage of the sheriff, witness, or person shall be paid from the funds in the state treasury for the use of the Commissioner in the same manner that other expenses of the Commissioner are paid.

(2) The Commissioner may issue and apply to enforce subpoenas in this state at the request of a securities agency or commissioner of another state if the activities constituting an alleged violation for which the information is sought would be a violation of this chapter if the activities had occurred in this state.

(c) In case of refusal to obey a subpoena issued under any Code section of this chapter to any person, a superior court of appropriate jurisdiction, upon application by the Commissioner, may issue to the person any order requiring him to appear before the court to show cause why he should not be held in contempt for refusal to obey the subpoena. Failure to obey a subpoena may be punished by the court as contempt of court.

(d) In the case of any investigation conducted under this Code section, the Commissioner may hold hearings or he may appoint an investigative agent to conduct the hearings who shall have the same powers and authority in conducting the hearings as are granted to the Commissioner in this Code section. The agent shall possess such qualifications as the Commissioner may require. A transcript of the testimony and evidence and objections resulting from such hearings shall be taken unless waived in writing by all parties present at the hearings. Copies of the transcript shall be available to all parties present at the hearing upon payment of the reasonable expense of reproducing the transcript. All recommendations of the investigative agent shall be advisory only and shall not have the effect of an order of the Commissioner.

(e) In any case where a hearing is conducted by an investigative agent, he shall submit to the Commissioner a written report, including the transcript of the testimony in evidence if requested by the Commissioner, the findings of the hearing, and a recommendation of the action to be taken by the Commissioner. The recommendation of the agent shall be approved, modified, or disapproved by the Commissioner. The Commissioner may direct an investigative agent to take additional testimony or permit introduction of further documentary evidence.

(f) In addition to any other hearings and investigations which the Commissioner is authorized or required to hold by this chapter, the Commissioner is also authorized to hold general investigative hearings on his own motion with respect to any matter under this chapter. A general investigative hearing as provided for in this subsection may be conducted by any person designated by the Commissioner for that purpose and may, but need not, be transcribed by the Commissioner or by any other interested party. No formal action may be taken as a result of such investigative hearing; but the Commissioner may take such action as he deems appropriate, based on the information developed in the hearing and on any other information which he may have.

(g) The Commissioner may disclose information obtained in connection with an investigation under this Code section to the extent provided in this Code section and if disclosure is for the purpose of a civil, administrative, or criminal investigation or proceeding by a securities agency or law enforcement agency and the receiving agency represents that, under the applicable law, protections exist to preserve the integrity, confidentiality, and security of the information. (Code 1981, § 10-5A-20, enacted by Ga. L. 1988, p. 1636, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2010, p. 838, § 10/SB 388.)

The 2010 amendment, effective June 3, 2010, inserted "in print or electronically" in paragraph (a)(3).

CHAPTER 6

AGENCY

Article 3

Rights and Liabilities of Principal to Third Persons

Sec.
10-6-64. Agent may be witness; credibility; admissibility of agent's declarations [Repealed].

Article 7

Financial Power of Attorney

Sec.
10-6-142. Statutory form for financial power of attorney.

ARTICLE 1

CREATION AND NATURE OF RELATIONSHIP

10-6-1. When agency relationship arises.

JUDICIAL DECISIONS

Analysis

General Consideration
Agency by Ratification
Procedure
2. Evidence
4. Questions of Law and Fact

General Consideration

Contractual relationships.

Trial court erred in granting a rental company summary judgment in a car owner's action alleging that the company breached a settlement agreement because the company was obligated to pay any settlement amounts negotiated by the company's agent, an independent third party administrator, and issues of fact remained as to whether the company issued payment according to the terms of the settlement agreement, which were also disputed. Hearn v. Dollar Rent A Car, Inc., 315 Ga. App. 164, 726 S.E.2d 661 (2012).

Trial court did not abuse the court's discretion in denying a temporary staffing agency's motion for a new trial based on the failure of a widow and a hospital to spontaneously disclose their litigation agreement because there was nothing in the record to show that the agency's ignorance of the litigation agreement rendered the trial fundamentally unfair; even if the widow benefitted from the hospital's efforts to enforce the hospital's right to indemnity, such incidental benefit did not make the hospital the widow's agent. Med. Staffing Network, Inc. v. Connors, 313 Ga. App. 645, 722 S.E.2d 370 (2012), cert. denied, No. S12C0940, 2012 Ga. LEXIS 533 (Ga. 2012).

Apparent authority, etc.

Apparent authority to offer stock in a company did not arise from the fact that the person making the offer was a part owner of the company and a company officer, particularly as a promise of transfer of company stock was not ordinary company business. Reindel v. Mobile Content Network Co., LLC, 652 F. Supp. 2d 1278 (N.D. Ga. 2009).

Foreclosure sale valid when no duties violated. — Foreclosure sale was valid because there was no defect in the assignment of the power of sale from the nominee to the lender when the security deed did not lack any essential terms regarding the nominee's role, rights, or

duties under O.C.G.A. § 10-6-1 and no consideration was needed under O.C.G.A. § 44-14-64(a). The lender did not violate the automatic stay of 11 U.S.C. § 362(a) by recording the sale post-petition because the Chapter 13 debtor retained no interest in property after the sale. Bishop v. GMAC Mortg., LLC (In re Bishop), 470 B.R. 633 (Bankr. M.D. Ga. 2011).

Agency held created.

Joint insured clause of a fidelity bond that gave a holding company the right to "act for" the company's subsidiary, a bank, created an agency relationship and did not entitle the trustee in the holding company's bankruptcy case to pursue a breach of contract action based on the insurer's failure to pay the bank's claim; the cause of action was not part of the bankruptcy estate. Lubin v. Cincinnati Ins. Co., 677 F.3d 1039 (11th Cir. 2012) (Unpublished).

In a breach of fiduciary duty and fraud action wherein an investment company obtained a jury verdict in the company's favor as against a site manager, the manager's spouse, and others, the trial evidence supported the conclusion that a fiduciary relationship arose between the site manager and the investment company as the investment company entrusted significant financial responsibility and authority to the site manager, who engaged in a financial kickback scheme diverting thousands of dollars from the investment company. Wright v. Apt. Inv. & Mgmt. Co., 315 Ga. App. 587, 726 S.E.2d 779 (2012).

Cited in Triad Health Mgmt. of Ga., III, LLC v. Johnson, 298 Ga. App. 204, 679 S.E.2d 785 (2009); Kitchens v. Brusman, 303 Ga. App. 703, 694 S.E.2d 667 (2010); Griffin v. State Bank, 312 Ga. App. 87, 718 S.E.2d 35 (2011).

Agency by Ratification

Evidence of spouse's actual or apparent authority insufficient. — Although it was undisputed that the patient did not sign the arbitration agreement personally, the operator asserted that the patient's spouse was the patient's agent and, therefore, had the authority to bind the patient to the agreement by signing the spouse's name; in Georgia, an agency relationship was created whenever one person, expressly or by implication, authorized another to act for the person or subsequently ratified the acts of another in the person's behalf, O.C.G.A. § 10-6-1, and because the operator had not proven, by a preponderance of the evidence, that the patient expressly authorized the operator to act on the patient's behalf in signing the arbitration agreement, an agency relationship was created, if at all, by implication. Under Georgia law, the agent's authority shall be construed to include all necessary and usual means for effectually executing it. O.C.G.A. § 10-6-50, and even assuming that the version of events put forth by the operator's witnesses was true, the operator failed to meet the operator's burden of proving that the patient's spouse had actual or apparent authority to bind the patient by signing the arbitration agreement; accordingly, the arbitration agreement was not enforceable against the patient pursuant to 9 U.S.C. § 4, and the operator's motion to compel arbitration and stay discovery was denied. Gentry v. Beverly Enterprises-Georgia Inc., 714 F. Supp. 2d 1225 (S.D. Ga. 2009).

Procedure

2. Evidence

Evidence held insufficient.

Summary judgment for a neighbor in a negligence suit by landowners arising out of fire damage was proper because a corporation, not the neighbor, owned the land on which the fire was set, and the person performing the burn was employed by the corporation, not the neighbor. There was no showing of agency under O.C.G.A. § 10-6-1 or O.C.G.A. § 51-2-1(a) between the neighbor and the employee. Barrs v. Acree, 302 Ga. App. 521, 691 S.E.2d 575 (2010).

4. Questions of Law and Fact

Jury questions if evidence shows agency.

Trial court erred in granting summary judgment to a surety because jury questions existed as to whether two subcontractors were the same company, whether an owner acted as an agent on behalf of one of those subcontractors when the owner procured the bonds, and whether

the bonds were intentionally written fraudulently based on admissions made by counsel for the surety during the hearing. Choate Constr. Co. v. Auto-Owners Ins. Co., 318 Ga. App. 682, 736 S.E.2d 443 (2012).

Trial court erred by granting summary judgment to a private entity operating a county animal control shelter because genuine issues of material fact existed as to whether the shelter could be held liable for the euthanization of a hospitalized patient's dogs based upon the theory of promissory estoppel since while the releases may have authorized the shelter to euthanize the dogs, the shelter was also authorized to subsequently enter into a promise not to do so; thus, the patient, as a principal, would be entitled to damages suffered as a result of representations made to the patient's authorized agent acting on the patient's behalf to protect the well-being of the patient's dogs. Greenway v. Northside Hosp., 317 Ga. App. 371, 730 S.E.2d 742 (2012).

Summary judgment improper. — Complaint alleging that an agreement had been reached between plaintiff's neighbor and a representative of an animal control facility for the safekeeping of plaintiff's dogs while plaintiff was hospitalized, set forth a claim for promissory estoppel, O.C.G.A. § 13-3-44(a), and plaintiff, as a principal, would be entitled to damages suffered as a result of representations made to plaintiff's neighbor, authorized agent acting on plaintiff's behalf, to protect the well-being of plaintiff's dogs. Thus, a grant of summary judgment in favor of the operator of the animal control facility was reversed. Greenway v. Northside Hosp., Inc., 317 Ga. App. 371, 730 S.E.2d 742 (2012).

10-6-2. Formality necessary to create agency.

JUDICIAL DECISIONS

ANALYSIS

REAL ESTATE TRANSACTIONS

Real Estate Transactions

Authority of agent to execute option contract. — Because the statute of frauds requires that an option contract for the purchase of land be in writing, the authority of an agent to execute such a contract likewise must be in writing. Garrett v. S. Health Corp. of Ellijay, Inc., 320 Ga. App. 176, 739 S.E.2d 661 (2013).

ARTICLE 2

RELATIONS BETWEEN PRINCIPAL AND AGENT

10-6-21. Extent of agent's authority; liability for exceeding, violating, or disregarding instructions.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Issues of material fact as to validity of agent's transfer of property. — Genuine issues of material fact existed as to the validity of a property transfer because there was evidence that the actions of the agent in transferring the property were in contravention of the principal's actions and intent and were attempts to benefit

the agent's own position. Harris v. Peterson, 318 Ga. App. 382, 734 S.E.2d 93 (2012).

10-6-23. Agent may follow instructions from one of several principals.

Law reviews. — For annual survey of law on business associations, see 62 Mercer L. Rev. 41 (2010).

10-6-25. Agent must account for profit from principal's property.

JUDICIAL DECISIONS

Breach of duty of loyalty by employee. — Trial court's finding that a former employee breached the duty of loyalty to a former employer was supported by some evidence because competition against the employer by the employer's employees was specifically prohibited by the terms of the employee manual, the employee agreed to abide by the employee manual, and the employee engaged in a rival business while employed by the employer. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532 (2011).

10-6-32. Owner's right to sell property placed with broker; broker's right to commissions.

JUDICIAL DECISIONS

Analysis

Broker's Right to Compensation

Broker's Right to Compensation

Commission where purchaser's offer is contingent on obtaining loan.

Trial court erred in granting a real estate broker's motion for summary judgment on the broker's counterclaim for real estate commissions because a potential buyer was unable to obtain the financing, which prevented sales from closing, and if the exception to the financing contingencies did not apply, then under Georgia law, the buyer's obligation as the non-performing party to pay the commissions never arose, for in those circumstances the commissions were never earned since the sales contracts were neither binding nor enforceable; the broker did not depose or otherwise obtain evidence from a bank as to why the bank denied the buyer's loan, and the broker did not seek the buyer's financial records to determine how much money the buyer had on hand for a closing or ask whether additional investors or sources would provide the buyer with the down payment money. Desmear Sys., Inc. v. Vines, 305 Ga. App. 730, 700 S.E.2d 711 (2010).

10-6-33. Revocation of agency — When and how done; damages for unreasonable revocation.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

No power to collect additional compensation shown. — In a breach of contract and fraud action for unpaid commissions brought by an independent sales representative against a manufacturer, the trial court properly determined that the independent sales representative could not recover continuing commissions after the agreement expired based on the theory of irrevocable agency as the agreement expressly stated that no additional compensation would be paid for equipment leases. Irvin Int'l, Inc. v. Riverwood Int'l Corp., 299 Ga. App. 633, 683 S.E.2d 158 (2009).

ARTICLE 3

RIGHTS AND LIABILITIES OF PRINCIPAL TO THIRD PERSONS

Law reviews. — For article, "Noticing the Bankruptcy Sale: The Purchased Property May Not Be as 'Free and Clear of All Liens, Claims and Encumberances' as You Think," see 15 (No. 5) Ga. St. B.J. 12 (2010).

10-6-50. Scope of agent's authority; effect of private instructions; dealing with special agent.

JUDICIAL DECISIONS

Analysis

Scope of Authority
2. Apparent Authority

Scope of Authority

2. Apparent Authority

Real estate salesman apparently has authority to guarantee purchaser's lease will be cancelled.

Although it was undisputed that the patient did not sign the arbitration agreement personally, the operator asserted that the patient's spouse was the patient's agent and, therefore, had the authority to bind the patient to the agreement by signing the spouse's name; in Georgia, an agency relationship was created whenever one person, expressly or by implication, authorized another to act for the person or subsequently ratified the acts of another in the person's behalf, O.C.G.A. § 10-6-1, and because the operator had not proven, by a preponderance of the evidence, that the patient expressly authorized the operator to act on the patient's behalf in signing the arbitration agreement, an agency relationship was created, if at all, by implication. Under Georgia law, the agent's authority shall be construed to include all necessary and usual means for effectually executing it. O.C.G.A. § 10-6-50, and even assuming that the version of events put forth by the operator's witnesses was true, the operator failed to meet the operator's burden of proving that the patient's spouse had actual or apparent authority to bind the patient by signing the arbitration agreement; accordingly, the arbitration agreement was not enforceable against the patient pursuant to 9 U.S.C. § 4, and the

operator's motion to compel arbitration and stay discovery was denied. Gentry v. Beverly Enterprises-Georgia Inc., 714 F. Supp. 2d 1225 (S.D. Ga. 2009).

10-6-51. Principal bound by acts within scope of authority; no right to ratify in part.

JUDICIAL DECISIONS

Analysis

General Consideration
When Principal Bound
1. Generally

General Consideration

Cited in Triad Health Mgmt. of Ga., III, LLC v. Johnson, 298 Ga. App. 204, 679 S.E.2d 785 (2009).

When Principal Bound

1. Generally

Principal only bound by acts within scope of agent's authority.

Fact that the insured sent in a late payment after an agent allegedly told the insured that the insurer would provide retroactive coverage was of no issue; the late payment did not necessarily evidence a belief on the insured's part that the agent had the authority to provide retroactive coverage. Even if the insured truly believed the agent had the authority to provide retroactive coverage, it was not a reasonable belief. Rutland v. State Farm Mut. Auto. Ins. Co., No. 10-10734, 2010 U.S. App. LEXIS 16744 (11th Cir. Aug. 12, 2010) (Unpublished).

Acts held within scope of authority.

Lenders' title commitment provided that the closing documents had to be executed to the satisfaction of the title insurer's agents; that condition was fulfilled when the agents reviewed, approved, and accepted closing documents forged by an imposter and recorded the documents. As the insurer was bound by the authorized acts of the insurer's agents, the insurer was liable to the lenders. Keyingham Invs., LLC v. Fid. Nat'l Title Ins. Co., 298 Ga. App. 467, 680 S.E.2d 442 (2009).

Trial court erred in granting a rental company summary judgment in a car owner's action alleging that the company breached a settlement agreement because the company was obligated to pay any settlement amounts negotiated by the company's agent, an independent third party administrator, and issues of fact remained as to whether the company issued payment according to the terms of the settlement agreement, which were also disputed. Hearn v. Dollar Rent A Car, Inc., 315 Ga. App. 164, 726 S.E.2d 661 (2012).

10-6-52. Ratification relates back to agent's act; how act ratified; no revocation of ratification.

JUDICIAL DECISIONS

Analysis

General Consideration
Implied Ratification

General Consideration

Chief executive officer terminated for cause based on ratification of chief financial officer's impropriety. — Chief executive officer of a housing authority was properly terminated for cause because the chief executive officer

materially harmed the housing authority's business when the chief executive officer ratified the housing authority's chief financial officer's violation of federal rules the housing authority was required to comply with, when the proceeds of the sale of an asset were diverted to an improper purpose as: (1) the chief executive officer certified that the proceeds would be used only for a proper purpose; (2) the chief executive officer was notified of the diversion; and (3) the chief executive officer did not object or inform the housing authority's board of directors or the federal government of the diversion or seek the permission of either body for the diversion. Jones v. Hous. Auth. of Fulton County, 315 Ga. App. 15, 726 S.E.2d 484 (2012).

Implied Ratification

Ratification of forged quitclaim deed between ex-spouses. — Ex-husband's action to quit title in certain property and to set aside a forged quitclaim deed transferring his interest in the property to the ex-wife was remanded for a jury to decide whether the ex-husband ratified the quitclaim deed in his divorce settlement agreement with his ex-wife because given the ambiguity in the settlement agreement arising from the phrase "liability on the property," a factual issue existed regarding the intention of the parties, which had to be determined in light of all the relevant evidence; to the extent that the ex-husband merely acknowledged that his ex-wife encumbered her share of the property, that acknowledgment would not evidence an election to treat the forged quitclaim deed as valid, and if the ex-husband believed that the property interest he was accepting from his ex-wife was encumbered, he could have wanted to clarify that he was not personally liable for the debt and to bargain for protection from any loss he could incur as the result of the debt. Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583 (2010).

Ratification of unauthorized acts by employer.

Principal was liable for breach of a written contract between the principal and a construction company because realty company employees who made additional work requests had authority to bind the principal, and the record supported a finding that the vice president, acting within actual authority, ratified, and authorized the actions of those employees who were acting as agents for the vice president. Circle Y Constr., Inc. v. WRH Realty Servs., No. 10-13746, 2011 U.S. App. LEXIS 10629 (11th Cir. May 24, 2011) (Unpublished).

10-6-53. Form in which agent acts immaterial.

JUDICIAL DECISIONS

When issue of who is bound is question of fact.

Trial court erred by granting summary judgment to a private entity operating a county animal control shelter because genuine issues of material fact existed as to whether the shelter could be held liable for the euthanization of a hospitalized patient's dogs based upon the theory of promissory estoppel since while the releases may have authorized the shelter to euthanize the dogs, the shelter was also authorized to subsequently enter into a promise not to do so; thus, the patient, as a principal, would be entitled to damages suffered as a result of representations made to the patient's authorized agent acting on the patient's behalf to protect the well-being of the patient's dogs. Greenway v. Northside Hosp., 317 Ga. App. 371, 730 S.E.2d 742 (2012).

Summary judgment improper.

Trial court erred in granting an insurer summary judgment and in denying an attorney summary judgment on the insurer's breach of contract claim because the evidence showed no meeting of the minds identifying the attorney as a party to the contract upon which the insurer based the insurer's claim and, therefore, no enforceable contract existed between the insured and the attorney; the closing instructions formed a contract between the insured and a law firm. Villanueva v. First Am.

Title Ins. Co., 313 Ga. App. 164, 721 S.E.2d 150 (2011), cert. denied, No. S12C0502, 2012 Ga. LEXIS 607 (Ga. 2012).

Complaint alleging that an agreement had been reached between the plaintiff's neighbor and a representative of an animal control facility for the safekeeping of plaintiff's dogs while plaintiff was hospitalized set forth a claim for promissory estoppel, O.C.G.A. § 13-3-44(a), and plaintiff, as a principal, would be entitled to damages suffered as a result of representations made to the plaintiff's neighbor, the plaintiff's authorized agent acting on the plaintiff's behalf, to protect the well-being of the plaintiff's dogs. Thus, a grant of summary judgment in favor of the operator of the animal control facility was reversed. Greenway v. Northside Hosp., Inc., 317 Ga. App. 371, 730 S.E.2d 742 (2012).

10-6-54. When undisclosed principal liable on contract.

JUDICIAL DECISIONS

Analysis

Agent Liability

Agent Liability

If principal and agent are improperly joined, one may be dismissed.

Realty company was liable to a construction company for breaching oral agreements because, to avoid personal liability, the realty company had the duty to disclose that the company was acting solely as the principal's agent in making the oral contracts. Circle Y Constr., Inc. v. WRH Realty Servs., No. 10-13746, 2011 U.S. App. LEXIS 10629 (11th Cir. May 24, 2011) (Unpublished).

10-6-58. Notice to agent.

JUDICIAL DECISIONS

Analysis

Application

Application

When issue of who is bound is question of fact. — Trial court erred by granting summary judgment to a private entity operating a county animal control shelter because genuine issues of material fact existed as to whether the shelter could be held liable for the euthanization of a hospitalized patient's dogs based upon the theory of promissory estoppel since while the releases may have authorized the shelter to euthanize the dogs, the shelter was also authorized to subsequently enter into a promise not to do so; thus, the patient, as a principal, would be entitled to damages suffered as a result of representations made to the plaintiff's authorized agent acting on the plaintiff's behalf to protect the well-being of the plaintiff's dogs. Greenway v. Northside Hosp., 317 Ga. App. 371, 730 S.E.2d 742 (2012).

No imputed knowledge shown. — Superior court did not err in granting a purchaser summary judgment in an administrator's action alleging that the purchaser aided and abetted an executor's breach of fiduciary duties when it bought properties from the executor because, assuming that an individual acted as agent for a purchaser in filing an affidavit seeking a dispossessory warrant prior to the purchase of properties, such evidence did not show that any knowledge by the individual and a second purchaser of the executor's alleged fraud, which they concealed for their own benefit, could be imputed to the purchaser; for similar reasons, the purchaser could not have ratified the alleged tortious conduct of the individ-

ual and the second purchaser. Witcher v. JSD Props., LLC, 286 Ga. 717, 690 S.E.2d 855 (2010).

10-6-62. When principal to benefit from agent's contract; defenses against undisclosed principal.

JUDICIAL DECISIONS

When issue of who is bound is question of fact. — Trial court erred by granting summary judgment to a private entity operating a county animal control shelter because genuine issues of material fact existed as to whether the shelter could be held liable for the euthanization of a hospitalized patient's dogs based upon the theory of promissory estoppel since while the releases may have authorized the shelter to euthanize the dogs, the shelter was also authorized to subsequently enter into a promise not to do so; thus, the patient, as a principal, would be entitled to damages suffered as a result of representations made to the plaintiff's authorized agent acting on the plaintiff's behalf to protect the well-being of the plaintiff's dogs. Greenway v. Northside Hosp., 317 Ga. App. 371, 730 S.E.2d 742 (2012).

Summary judgment improper. — Complaint alleging that an agreement had been reached between plaintiff's neighbor and a representative of an animal control facility for the safekeeping of plaintiff's dogs while plaintiff was hospitalized set forth a claim for promissory estoppel, O.C.G.A. § 13-3-44(a), and plaintiff, as a principal, would be entitled to damages suffered as a result of representations made to the plaintiff's neighbor, the plaintiff's authorized agent acting on the plaintiff's behalf, to protect the well-being of the plaintiff's dogs. Thus, a grant of summary judgment in favor of the operator of the animal control facility was reversed. Greenway v. Northside Hosp., Inc., 317 Ga. App. 371, 730 S.E.2d 742 (2012).

10-6-64. Agent may be witness; credibility; admissibility of agent's declarations.

Reserved. Repealed by Ga. L. 2011, p. 99, § 17/HB 24, effective January 1, 2013.

Editor's notes. — This Code section was based on Orig. Code 1863, § 2184; Code 1868, § 2180; Code 1873, § 2206; Code 1882, § 2206; Civil Code 1895, § 3034; Civil Code 1910, § 3606; Code 1933, § 4-315.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

ARTICLE 4

RIGHTS AND LIABILITIES OF AGENT AS TO THIRD PERSONS

10-6-85. Individual liability of agent by undertaking, when exceeding authority, and for tort; negligence of underservant.

Law reviews. — For annual survey of law on business associations, see 62 Mercer L. Rev. 41 (2010).

ARTICLE 7

FINANCIAL POWER OF ATTORNEY

10-6-142. Statutory form for financial power of attorney.

The Georgia Statutory Form for Financial Power of Attorney shall be substantially as follows:

FINANCIAL POWER OF ATTORNEY

County of _____

State of Georgia

I, _____, (hereinafter "Principal"), a resident of _____ County, Georgia, do hereby constitute and appoint _____ my true and lawful attorney-in-fact (hereinafter "Agent") for me and give such person the power(s) specified below to act in my name, place, and stead in any way which I, myself, could do if I were personally present with respect to the following matters:

(Directions: To give the Agent the powers described in paragraphs 1 through 13, place your initials on the blank line at the end of each paragraph. If you DO NOT want to give a power to the Agent, strike through the paragraph or a line within the paragraph and place your initials beside the stricken paragraph or stricken line. The powers described in any paragraph not initialed or which has been struck through will not be conveyed to the Agent. Both the Principal and the Agent must sign their full names at the end of the last paragraph.)

1. Bank and Credit Union Transactions: To make, receive, sign, endorse, execute, acknowledge, deliver, and possess checks, drafts, bills of exchange, letters of credit, notes, stock certificates, withdrawal receipts and deposit instruments relating to accounts or deposits in, or certificates of deposit of banks, savings and loans, credit unions, or other institutions or associations. _____

2. Payment Transactions: To pay all sums of money, at any time or times, that may hereafter be owing by me upon any account, bill or exchange, check, draft, purchase, contract, note, or trade acceptance made, executed, endorsed, accepted, and delivered by me or for me in my name, by my Agent. _____

Note: If you initial paragraph 3 or paragraph 4 which follow, a notarized signature will be required on behalf of the Principal.

3. Real Property Transactions: To lease, sell, mortgage, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, sale, purchase, exchange, and acquisition of, and to accept, take, receive, and possess any interest in real property whatsoever, on such terms and conditions, and under such covenants, as my Agent shall deem proper; and to maintain, repair, tear down, alter, rebuild, improve, manage, insure, move, rent, lease, sell, convey, subject to liens, mortgages, and security deeds, and in any way or manner deal with all or any part of any interest in real property whatsoever, including specifically, but without limitation, real property lying and being situate in the State of Georgia, under such terms and conditions, and under such covenants, as my Agent shall deem proper and may for all deferred payments accept purchase money notes payable to me and secured by mortgages or deeds to secure debt, and may from time to time collect and cancel any of said notes, mortgages, security interests, or deeds to secure debt. _____

4. Personal Property Transactions: To lease, sell, mortgage, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, sale, purchase, exchange, and acquisition of, and to accept, take, receive, and possess any personal property whatsoever, tangible or intangible, or interest thereto, on such terms and conditions, and under such covenants, as my Agent shall deem proper; and to maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens or mortgages, or to take any other security interests in said property which are recognized under the Uniform Commercial Code as adopted at that time under the laws of Georgia or any applicable state, or otherwise hypothecate, and in any way or manner deal with all or any part of any real or personal property whatsoever, tangible or intangible, or any interest therein, that I own at the time of execution or may thereafter acquire, under such terms and conditions, and under such covenants, as my Agent shall deem proper. _____

5. Stock and Bond Transactions: To purchase, sell, exchange, surrender, assign, redeem, vote at any meeting, or otherwise transfer any and all shares of stock, bonds, or other securities in any business, association, corporation, partnership, or other legal entity, whether private or public, now or hereafter belonging to me. _____

6. Safe Deposits: To have free access at any time or times to any safe-deposit box or vault to which I might have access. _____

7. Borrowing: To borrow from time to time such sums of money as my Agent may deem proper and execute promissory notes, security deeds or agreements, financing statements, or other security instruments in such form as the lender may request and renew said notes and security instruments from time to time in whole or in part. _____

8. Business Operating Transactions: To conduct, engage in, and otherwise transact the affairs of any and all lawful business ventures of whatever nature or kind that I may now or hereafter be involved in. _____

9. Insurance Transactions: To exercise or perform any act, power, duty, right, or obligation, in regard to any contract of life, accident, health, disability, liability, or other type of insurance or any combination of insurance; and to procure new or additional contracts of insurance for me and to designate the beneficiary of same; provided, however, that my Agent cannot designate himself or herself as beneficiary of any such insurance contracts. _____

10. Disputes and Proceedings: To commence, prosecute, discontinue, or defend all actions or other legal proceedings touching my property, real or personal, or any part thereof, or touching any matter in which I or my property, real or personal, may be in any way concerned. To defend, settle, adjust, make allowances, compound, submit to arbitration, and compromise all accounts, reckonings, claims, and demands whatsoever that now are, or hereafter shall be, pending between me and any person, firm, corporation, or other legal entity, in such manner and in all respects as my Agent shall deem proper. _____

11. Hiring Representatives: To hire accountants, attorneys at law, consultants, clerks, physicians, nurses, agents, servants, workmen, and others and to remove them, and to appoint others in their place, and to pay and allow the persons so employed such salaries, wages, or other remunerations, as my Agent shall deem proper. _____

12. Tax, Social Security, and Unemployment: To prepare, to make elections, to execute and to file all tax, social security, unemployment insurance, and informational returns required by the laws of the United States, or of any state or subdivision thereof, or of any foreign government; to prepare, to execute, and to file all other papers and instruments which the Agent shall think to be desirable or necessary for safeguarding of me against excess or illegal taxation or against penalties imposed for claimed violation of any law or other governmental regulation; and to pay, to compromise, or to contest or to apply

for refunds in connection with any taxes or assessments for which I am or may be liable. _____

13. Broad Powers: Without, in any way, limiting the foregoing, generally to do, execute, and perform any other act, deed, matter, or thing whatsoever that should be done, executed, or performed, including, but not limited to, powers conferred by Code Section 53-12-261 of the Official Code of Georgia Annotated, or that in the opinion of my Agent should be done, executed, or performed, for my benefit or the benefit of my property, real or personal, and in my name of every nature and kind whatsoever, as fully and effectually as I could do if personally present. _____

14. Effective Date: This document will become effective upon the date of the Principal's signature unless the Principal indicates that it should become effective at a later date by completing the following, which is optional.

The powers conveyed in this document shall not become effective until the following time or upon the occurrence of the following event or contingency:

Note: The Principal may choose to designate one or more persons to determine conclusively that the above-specified event or contingency has occurred. Such person or persons must make a written declaration under penalty of false swearing that such event or contingency has occurred in order to make this document effective. Completion of this provision is optional.

The following person or persons are designated to determine conclusively that the above-specified event or contingency has occurred:

Signed: _____

Principal

Agent

It is my desire and intention that this power of attorney shall not be affected by my subsequent disability, incapacity, or mental incompetence. However, I understand that it shall be revoked and the Agent's power canceled in the event a guardian is appointed for my property. As long as no such guardian is appointed, any and all acts done by the Agent pursuant to the powers conveyed herein during any period of

my disability, incapacity, or mental incompetence shall have the same force and effect as if I were not disabled, incapacitated, or mentally incompetent.

I may, at any time, revoke this power of attorney, and it shall be canceled by my death. Otherwise, unless a guardian is appointed for my property, this power of attorney shall be deemed to be in full force and effect as to all persons, institutions, and organizations which shall act in reliance thereon prior to the receipt of written revocation thereof signed by me and prior to my death.

I do hereby ratify and confirm all acts whatsoever which my Agent shall do, or cause to be done, in or about the premises, by virtue of this power of attorney.

All parties dealing in good faith with my Agent may fully rely upon the power of and authority of my Agent to act for me on my behalf and in my name, and may accept and rely on agreements and other instruments entered into or executed by the agent pursuant to this power of attorney.

This instrument shall not be effective as a grant of powers to my Agent until my Agent has executed the Acceptance of Appointment appearing at the end of this instrument. This instrument shall remain effective until revocation by me or my death, whichever occurs first.

Compensation of Agent. (Directions: Initial the line following your choice.)

1. My Agent shall receive no compensation for services rendered. _____

2. My Agent shall receive reasonable compensation for services rendered. _____

3. My Agent shall receive $_____ for services rendered. _____

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this _____ day of _____, _____.

Principal

WITNESSES

Signature and Address

Signature and Address

Note: A notarized signature is not required unless you have initialed paragraph 3 or 4 regarding property transactions.

I, _____, a Notary Public, do hereby certify that _____ personally appeared before me this date and acknowledged the due execution of the foregoing Power of Attorney.

Notary Public

State of Georgia

County of _____

ACCEPTANCE OF APPOINTMENT

I, _____ (print name), have read the foregoing Power of Attorney and am the person identified therein as Agent for _____ (name of grantor of power of attorney), the Principal named therein. I hereby acknowledge the following:

I owe a duty of loyalty and good faith to the Principal, and must use the powers granted to me only for the benefit of the Principal.

I must keep the Principal's funds and other assets separate and apart from my funds and other assets and titled in the name of the Principal. I must not transfer title to any of the Principal's funds or other assets into my name alone. My name must not be added to the title of any funds or other assets of the Principal, unless I am specifically designated as Agent for the Principal in the title.

I must protect, conserve, and exercise prudence and caution in my dealings with the Principal's funds and other assets.

I must keep a full and accurate record of my acts, receipts, and disbursements on behalf of the Principal, and be ready to account to the Principal for such acts, receipts, and disbursements at all times. I must provide an annual accounting to the Principal of my acts, receipts, and disbursements, and must furnish an accounting of such acts, receipts, and disbursements to the personal representative of the Principal's estate within 90 days after the date of death of the Principal.

I have read the Compensation of Agent paragraph in the Power of Attorney and agree to abide by it.

I acknowledge my authority to act on behalf of the Principal ceases at the death of the Principal.

I hereby accept the foregoing appointment as Agent for the Principal with full knowledge of the responsibilities imposed on me, and I will faithfully carry out my duties to the best of my ability.

Dated: _____, _____.

(Signature) _____

(Address) _____

Note: A notarized signature is not required unless the Principal initialed paragraph 3 or paragraph 4 regarding property transactions.

I, _____, a Notary Public, do hereby certify that _____ personally appeared before me this date and acknowledge the due execution of the foregoing Acceptance of Appointment.

Notary Public

(Code 1981, § 10-6-142, enacted by Ga. L. 1995, p. 1171, § 1; Ga. L. 1997, p. 143, § 10; Ga. L. 1999, p. 81, § 10; Ga. L. 1999, p. 485, § 4; Ga. L. 2000, p. 136, § 10; Ga. L. 2010, p. 579, § 3/SB 131.)

The 2010 amendment, effective July 1, 2010, in the middle of paragraph (13) of the Financial Power of Attorney form, deleted two commas and substituted "Code Section 53-12-261" for "Code Section 53-12-232"; and, in the Acceptance of Appointment form, inserted "named" near the end of the first sentence of the introductory paragraph.

CHAPTER 6A

BROKERAGE RELATIONSHIPS IN REAL ESTATE TRANSACTIONS

10-6A-2. Legislative findings, determinations, and declarations; chapter as basis for private rights of actions and defenses.

JUDICIAL DECISIONS

No breach of duties. — Trial court did not err in dismissing buyers' action against a real estate company and a real estate agent because any broker-client relationship between them and the company and the agent that could have been cre-

ated when the agent executed the first purchase and sale agreement as both the buyers' agent and the seller's agent ended when that agreement failed due to a low appraisal, and since the buyers engaged a buyer's agent, the relationship between the company, agent, and buyers was that of broker-customer; in the absence of a written agreement between them, the duties of the company and the agent were those set out in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-5, and although a broker who was engaged only by a seller owed a buyer, who was a "customer" rather than a "client" under the Act, O.C.G.A. § 10-6A-3(8), certain duties in terms of disclosure of information, the buyers' complaint did not aver that the company and agent breached any of those duties. Jones v. Bill Garlen Real Estate, 311 Ga. App. 372, 715 S.E.2d 777 (2011).

10-6A-3. Definitions.

JUDICIAL DECISIONS

No breach of duties. — Trial court did not err in dismissing buyers' action against a real estate company and a real estate agent because any broker-client relationship between them and the company and the agent that could have been created when the agent executed the first purchase and sale agreement as both the buyers' agent and the seller's agent ended when that agreement failed due to a low appraisal, and since the buyers engaged a buyer's agent, the relationship between the company, agent, and buyers was that of broker-customer; in the absence of a written agreement between them, the duties of the company and the agent were those set out in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-5, and although a broker who was engaged only by a seller owed a buyer, who was a "customer" rather than a "client" under the Act, O.C.G.A. § 10-6A-3(8), certain duties in terms of disclosure of information, the buyers' complaint did not aver that the company and agent breached any of those duties. Jones v. Bill Garlen Real Estate, 311 Ga. App. 372, 715 S.E.2d 777 (2011).

10-6A-4. Broker's legal relationship to customers or clients.

JUDICIAL DECISIONS

No breach of duties. — Trial court did not err in dismissing buyers' action against a real estate company and a real estate agent because any broker-client relationship between them and the company and the agent that could have been created when the agent executed the first purchase and sale agreement as both the buyers' agent and the seller's agent ended when that agreement failed due to a low appraisal, and since the buyers engaged a buyer's agent, the relationship between the company, agent, and buyers was that of broker-customer; in the absence of a written agreement between them, the duties of the company and the agent were those set out in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-5, and although a broker who was engaged only by a seller owed a buyer, who was a "customer" rather than a "client" under the Act, O.C.G.A. § 10-6A-3(8), certain duties in terms of disclosure of information, the buyers' complaint did not aver that the company and agent breached any of those duties. Jones v. Bill Garlen Real Estate, 311 Ga. App. 372, 715 S.E.2d 777 (2011).

10-6A-5. Duties and responsibilities of broker engaged by seller.

JUDICIAL DECISIONS

No fraud shown by agent.

Because a purchaser failed to act diligently, the purchaser was unable to recover from real estate agents or a broker based upon any alleged failure on the agents part to disclose information about property the purchaser bought from sellers under the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq. Shaw v. Robertson, 307 Ga. App. 337, 705 S.E.2d 210 (2010).

No breach of duties. — Trial court did not err in dismissing buyers' action against a real estate company and a real estate agent because any broker-client relationship between them and the company and the agent that could have been created when the agent executed the first purchase and sale agreement as both the buyers' agent and the seller's agent ended when that agreement failed due to a low appraisal, and since the buyers engaged a buyer's agent, the relationship between the company, agent, and buyers was that of broker-customer; in the absence of a written agreement between them, the duties of the company and the agent were those set out in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-5, and although a broker who was engaged only by a seller owed a buyer, who was a "customer" rather than a "client" under the Act, O.C.G.A. § 10-6A-3(8), certain duties in terms of disclosure of information, the buyers' complaint did not aver that the company and agent breached any of those duties. Jones v. Bill Garlen Real Estate, 311 Ga. App. 372, 715 S.E.2d 777 (2011).

CHAPTER 7

SURETYSHIP

ARTICLE 1

CONTRACT OF SURETYSHIP

Law reviews. — For article, "Enforcing Commercial Real Estate Loan Guaranties," see 15 (No. 2) Ga. St. B.J. 12 (2009).

10-7-2. Nature of obligation of surety.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Surety on bond for tax commissioner not liable for excess funds from tax sale. — Trial court did not err in granting a surety summary judgment in a lienholder's action under O.C.G.A. § 15-13-3 to recover excess funds from a tax sale because as the surety on the bond for the tax commissioner, the surety had no liability when the tax commissioner had none, O.C.G.A. § 10-7-2, and the tax

commissioner was not liable. Brina Bay Holdings, LLC v. Echols, 314 Ga. App. 242, 723 S.E.2d 533 (2012).

10-7-3. Suretyship not extended by implication.

Law reviews. — For article, "Enforcing Commercial Real Estate Loan Guaranties," see 15 (No. 2) Ga. St. B.J. 12 (2009).

JUDICIAL DECISIONS

Analysis

Application

Application

Insufficient identification of guarantor.

Lessor was not entitled to recover on an equipment lease guaranty because the guaranty was unenforceable since it omitted essential elements, including the guarantor's identity, and the lease could not supply the missing elements since this required consideration of parol evidence, which was inadmissible for a contract required by the statute of frauds to be in writing. Dabbs v. Key Equip. Fin., Inc., 303 Ga. App. 570, 694 S.E.2d 161 (2010).

In a supplier's action against a construction company and the company's principal to recover payment for building materials, the trial court did not err in granting the principal's motion for summary judgment because the guaranty the principal executed as part of a credit application was unenforceable under the statute of frauds, O.C.G.A. § 13-5-30, for failure to identify the principal debtor, and the fact that two separate agreements involving different promisors, the application for credit and the guaranty, were included in the same two-page document did not lead inexorably to the conclusion that the documents had to be construed together, but rather, the application and guaranty had to be treated as two separate writings; the guaranty did not refer to the application with sufficient clarity to justify relying upon the application to satisfy the statute of frauds and did not incorporate the terms of the application by reference, and while the guaranty stated that it was a "continuing guaranty" that covered all indebtedness due or which could become due, the application referred to an extension of credit for materials related to one specified subdivision. LaFarge Bldg. Materials, Inc. v. Pratt, 307 Ga. App. 767, 706 S.E.2d 131 (2011).

Guarantor personally liable on promissory note. — Trial court did not err by finding a guarantor personally liable on a promissory note because the trial court correctly found that the language of the promissory note, the unconditional guaranty, and the modification to the promissory note were unambiguous, and since the documents' provisions were clear, the trial court's proper role was to apply the terms as written; in the guaranty, the guarantor expressly waived all notices or defenses to which the guarantor could be entitled under the guaranty, to the extent permitted by law, and because the guarantor failed to assert any defense based upon an alleged incompetency to enter into a contract at the time the guarantor executed the guaranty, and because the guarantor failed to show that the guaranty's broad waiver of defenses was prohibited by statute or public policy, the guarantor was bound thereby. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

Corporate officers not individually liable. — Plain language of the document, although poorly drafted, established that the document was a promissory note made between two lenders and a corporation, and the officers signed the document in the officers' representative capacity on behalf of the corporation. A provision that the officers personally guaranteed the

debt could not be implied pursuant to O.C.G.A. § 10-7-3. Elwell v. Keefe, 312 Ga. App. 393, 718 S.E.2d 587 (2011).

Acts not covered by bond. — Trial court erred in granting a purchaser summary judgment and in denying an insurer summary judgment in the purchaser's action to recover against a bond the insurer issued to a mortgage lender under the Georgia Residential Mortgage Act, O.C.G.A. § 7-1-1000 et seq., because the acts that gave rise to the judgment the purchaser obtained against the lender occurred before the bond was in effect, and the lender's failure to pay the judgment was not an act that authorized recovery against the bond; the bond did not contain a specific covenant extending liability to acts prior to the bond's execution. Hartford Fire Ins. Co. v. iFreedom Direct Corp., 312 Ga. App. 262, 718 S.E.2d 103 (2011), cert. denied, No. S12C0408, 2012 Ga. LEXIS 246 (Ga. 2012).

10-7-4. Form of contract immaterial.

Law reviews. — For article, "Enforcing Commercial Real Estate Loan Guaranties," see 15 (No. 2) Ga. St. B.J. 12 (2009).

ARTICLE 2

RELATIVE RIGHTS OF CREDITOR AND SURETY

Law reviews. — For article, "Enforcing Commercial Real Estate Loan Guaranties," see 15 (No. 2) Ga. St. B.J. 12 (2009).

10-7-20. Effect of release of or compounding with surety.

JUDICIAL DECISIONS

Guarantor who admitted forging co-guarantor's signature estopped from pleading discharge. — Husband/guarantor was equitably estopped from arguing that a licensor's discharge of his co-guarantor and wife discharged him pursuant to O.C.G.A. §§ 10-7-20 and 10-7-21 because he signed an affidavit that he had forged his wife's signature on the guaranty without her knowledge, and the affidavit resulted in the wife's dismissal from the licensor's suit. Noons v. Holiday Hospitality Franchising, Inc., 307 Ga. App. 351, 705 S.E.2d 166 (2010).

10-7-21. "Novation" defined; effect on surety's liability.

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Cited in Western Sur. Co. v. APAC-Southeast, Inc., 302 Ga. App. 654, 691 S.E.2d 234 (2010).

Novation

No evidence of novation to discharge surety.

Trial court did not err in ruling that a

promissory note modification was simply a modification of certain terms of the original note instead of a novation that substantially increased a guarantor's personal liability under the guaranty and, therefore, discharged the guarantor because there was no merit to the guarantor's contention that, at the time the guarantor executed the note modification, such modification contemporaneously increased the guarantor's contractual obligations to the creditors; at the time the guarantor executed the note modification on behalf of the debtor, the guarantor was already personally obligated to pay the creditors, pursuant to the guaranty, the original principal amount plus the accrued interest. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

Application

Guarantor who admitted forging co-guarantor's signature estopped from pleading discharge. — Husband/guarantor was equitably estopped from arguing that a licensor's discharge of his co-guarantor and wife discharged him pursuant to O.C.G.A. §§ 10-7-20 and 10-7-21 because he signed an affidavit that he had forged his wife's signature on the guaranty without her knowledge, and the affidavit resulted in the wife's dismissal from the licensor's suit. Noons v. Holiday Hospitality Franchising, Inc., 307 Ga. App. 351, 705 S.E.2d 166 (2010).

10-7-22. Discharge of surety by increase of risk.

JUDICIAL DECISIONS

Analysis

General Consideration
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1. In General

General Consideration

Risk of guarantor not increased. — Trial court did not err in granting a payee's motion for summary judgment in the payee's action against a maker and a guarantor to collect on a promissory note and to enforce a guaranty because the payee established that there was no issue of material fact as to the defense that its actions in promising to refinance the loan or to extend a line of credit increased the guarantor's risk under the guaranty; a lender's failure to lend additional sums to a principal did not discharge a guarantor from liability for the amount that was actually advanced by the lender. Ga. Invs. Int'l, Inc. v. Branch Banking & Trust Co., 305 Ga. App. 673, 700 S.E.2d 662 (2010).

Acts Discharging Surety

1. In General

Consent by guarantor in advance to changes.

Trial court did not err in ruling that a promissory note modification was simply a modification of certain terms of the original note instead of a novation that substantially increased a guarantor's personal liability under the guaranty and, therefore, discharged the guarantor because there was no merit to the guarantor's contention that, at the time the guarantor executed the note modification, such modification contemporaneously increased the guarantor's contractual obligations to the creditors; given the unambiguous language of the guaranty, no issue of fact existed as to whether the guarantor

was discharged by any increased risk or a purported novation because the guarantor voluntarily and explicitly agreed in advance to the modification of the original note. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 709 S.E.2d 336 (2011).

10-7-24. Refusal to sue principal after notice by surety as discharge.

Law reviews. — For article, "A Georgia Practitioner's Guide to Construction Performance Bond Claims," see 60 Mercer L. Rev. 509 (2010).

10-7-30. Bad faith refusal of corporate surety to perform suretyship contract.

Law reviews. — For article, "A Georgia Practitioner's Guide to Construction Performance Bond Claims," see 60 Mercer L. Rev. 509 (2010).

10-7-31. Rights of certain parties claiming protection under a payment bond or security deposit; notice of commencement of work.

JUDICIAL DECISIONS

Notice to contractor deficient. — Trial court did not err in granting a general contractor and its surety summary judgment in a supplier's action to recover under a payment bond and a lien discharge bond for monies a subcontractor owed it for materials it supplied to a construction project because the supplier's notice to contractor failed to comply with O.C.G.A. §§ 10-7-31(a) and 44-14-361.5(c) because the notice wholly omitted required information; although the supplier's notice to contractor set forth the subcontractor's name, it failed to provide any address for the subcontractor as required under §§ 10-7-31(a)(2) and 44-14-361.5(c)(2), and although the notice set forth the name of the project, it failed to state the location of the construction project pursuant to §§ 10-7-31(a)(3) and 44-14-361.5(c)(3). Consol. Pipe & Supply Co. v. Genoa Constr. Servs., 302 Ga. App. 255, 690 S.E.2d 894 (2010).

ARTICLE 3

RIGHTS OF SURETY AGAINST PRINCIPAL, COSURETIES, AND THIRD PERSONS

10-7-56. Subrogation to rights of creditor — Priority of claim.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Standing to sue. — Insurer expressly limited its subrogation rights in a settlement agreement to any other person or entity who received either directly or indirectly any of the funds or property belonging to an injured child's estate. The

child's co-counsel did not receive any of the misappropriated funds; thus, because the insurer's subrogation rights did not reach co-counsel, the insurer did not have standing to sue co-counsel. Hartford Fire Ins. Co. v. Schneider, No. 07-14935, 2008 U.S. App. LEXIS 5039 (11th Cir. Mar. 6, 2008) (Unpublished).

CHAPTER 10

SEED-CAPITAL FUND

Article 1

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Article 2

Invest Georgia Fund

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ARTICLE 1

GENERAL PROVISIONS

Editor's notes. — Ga. L. 2013, p. 243, § 1/HB 318, not codified by the General Assembly, designated Code Sections 10-10-1 through 10-10-7 of Chapter 10 as Article 1, effective April 29, 2013.

10-10-1. Definitions.

As used in this article, the term:

(1) "Board" means the Board of Regents of the University System of Georgia.

(2) "Center" means the Advanced Technology Development Center created by the board and acknowledged and empowered to administer the fund by Article III, Section IX, Paragraph VI(g) of the Constitution of Georgia.

(3) "Enterprise" means a corporation, partnership, limited liability company, or other legal entity that has its principal place of business in this state and that is engaged in an entrepreneurial business, including, but not limited to, tenants of incubators. For the purposes

of this article, an enterprise shall not be considered to be engaged in an entrepreneurial business unless it is engaged in innovative work in the areas of technology, bioscience, manufacturing, marketing, agriculture, or information related ventures that will increase the state's share of domestic or international markets. An enterprise engaged primarily in business of a mercantile nature shall not be considered engaged in an entrepreneurial business. An enterprise shall be required to be young, as determined by the center.

(4) "Equity contribution" means:

(A) Moneys from the fund used to make direct investments by the state in qualified securities of enterprises; and

(B) The capital of an investment entity contributed by the fund, as created in Code Section 10-10-3, and contributed by other investors, which capital shall be used by the investment entity to make investments in qualified securities of one or more enterprises as provided by this article and to pay the expenses of the investment entity but shall not include any current or accumulated income of the investment entity.

(5) "Fund" means the Seed-Capital Fund created in Code Section 10-10-3.

(6) "Incubator" means a facility that leases small units of space to tenants and which maintains or provides access to business development services for use by the tenants or member firms.

(7) "Investment entity" means a limited partnership, a limited liability company, or other legal entity, including, without limitation, any such entity as to which the state is the sole limited liability owner, providing limited liability to its owners that is formed to receive, in part, an investment by the fund or an equity return of investment from a fund loan and for which a general partner or manager manages the equity contributions by making investments in qualified securities of one or more enterprises or, in the case of an investment entity as to which the state is the sole limited liability owner, in another investment entity, as permitted by this article and by paying the expenses of the investment entity.

(8) "Loan" means an advance of money from the fund to an enterprise or an investment entity on such terms as the center shall set, including, but not limited to, an absolute promise to repay the principal amount of the loan made by the recipient enterprise, and any return on investment that the center may require as a term or condition of the loan, which may include, but not be limited to, simple or compound interest or any form of equity participation.

(9) "Qualified security" means any note, stock, treasury stock bond, debenture, evidence of indebtedness, certificate of interest or

participation in any profit-sharing agreement, preorganization certificate or subscription, transferable share, investment contract, certificate of deposit for a security, certificate of interest or participation in a patent or application therefor or in royalty or other payments under such a patent or application, or, in general, any interest or instrument commonly known as a security or any certificate for, receipt for, guarantee of, or option, warrant, or right to subscribe to or purchase any of the foregoing of an enterprise.

(10) "State" means the State of Georgia. (Code 1981, § 10-10-1, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Ga. L. 2004, p. 431, § 1; Ga. L. 2006, p. 880, § 1/HB 1305; Ga. L. 2013, p. 243, § 2/HB 318.)

The 2013 amendment, effective April 29, 2013, substituted "article" for "chapter" throughout this Code section; and, in paragraph (7), inserted commas following "including" and "without limitation" near the middle.

10-10-3. Moneys in the fund to be handled in accordance with policies authorized by the board.

(a) The fund is created as a separate fund maintained by the board or a body designated by the board and shall be expended only as provided in this article. Pending their use as equity contributions or as loans, the moneys in the fund may be invested and reinvested in accordance with the investment policies authorized by the board or its designee. The entire cost of administration of the fund, including expenses of the center incurred in connection with the creation, operation, management, liquidation, and investment of fund moneys in enterprises, directly or through investment entities, may be paid from the assets of the fund. All moneys appropriated to or otherwise paid into the fund shall be presumptively concluded to have been committed to the purpose for which they have been appropriated or paid and shall not lapse.

(b) The fund shall consist of all moneys authorized by law for deposit in the fund, including, but not limited to, gifts, grants, private donations, and funds by government entities authorized to provide funding for the purposes authorized for use of the fund and any payments or returns on investments made by the center.

(c) In return for equity contributions by the fund, at the discretion of the center, the state shall receive either direct ownership of qualified securities of an enterprise or a limited liability ownership in an investment entity either directly or indirectly through an investment entity as to which the state is the sole limited liability owner as permitted in subsection (c) of Code Section 10-10-4 with rights accruing from investments in qualified securities by the investment entity. With

respect to loans made from the fund, the state shall receive repayment of the loan in accordance with its terms, with cash proceeds or other assets from such repayments being deposited in or held through the fund. Additional returns to the state shall be secured through the establishment and growth of innovative enterprises that create new, value added products, processes, and services and encourage growth and diversification in the economy of the state.

(d) Disbursements from the fund shall be made upon the instruction of the center director in accordance with the policies of the board.

(e) The center, subject to the approval of the board or its designee, shall be authorized to contract and have contracts and other legal documents prepared to carry out the provisions of this article.

(f) The board shall have the authority to issue policies governing the management and operation of the fund as needed. (Code 1981, § 10-10-3, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 1993, p. 1402, § 18; Ga. L. 2000, p. 473, § 1; Ga. L. 2004, p. 431, § 1; Ga. L. 2006, p. 880, § 2/HB 1305; Ga. L. 2013, p. 243, § 3/HB 318.)

The 2013 amendment, effective April 29, 2013, substituted "article" for "chapter" in the first sentence of subsection (a) and the end of subsection (e); and, in subsection (c), twice substituted "shall" for "will".

10-10-6. Distribution to be deposited in the fund.

All distributions made by an investment entity allocable to the state's limited partner interest or membership interest therein; all cash proceeds with respect to any loan, whether interest, the repayment of principal, or other amounts; or proceeds of the sale or transfer of qualified securities held directly by the fund shall be deposited in the fund for future investment in other investment entities, in other qualified securities of enterprises, for making loans as provided in this article, or to pay the cost of administration of the fund as provided in this article. (Code 1981, § 10-10-5, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Code 1981, § 10-10-6, as redesignated by Ga. L. 2004, p. 431, § 1; Ga. L. 2013, p. 243, § 4/HB 318.)

The 2013 amendment, effective April 29, 2013, substituted "article" for "chapter" twice in this Code section.

10-10-7. Publishing of annual report by center.

The center, on behalf of the board, shall publish in print or electronically an annual report which shall be made available to the Governor, the General Assembly, the Department of Economic Development or any successor agency, the chairperson of the House Committee on

Economic Development and Tourism, the chairperson of the Senate Economic Development Committee, and the board setting forth in detail the operations and transactions conducted by it pursuant to this chapter. The annual report shall specifically account for the ways in which the needs, mission, and programs of the center described in this chapter have been carried out. The center shall distribute its annual report by such means that will make it widely available to those innovative enterprises of special importance to the Georgia economy. The center shall not be required to distribute copies of the annual report to the members of the General Assembly but shall notify the members of the availability of the annual report in the manner which it deems to be most effective and efficient. (Code 1981, § 10-10-6, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Code 1981, § 10-10-7, as redesignated by Ga. L. 2004, p. 431, § 1; Ga. L. 2005, p. 1036, § 3/SB 49; Ga. L. 2009, p. 303, § 5/HB 117; Ga. L. 2010, p. 838, § 10/SB 388.)

The 2010 amendment, effective June 3, 2010, inserted "in print or electronically" in the first sentence.

ARTICLE 2

INVEST GEORGIA FUND

Editor's notes. — This article became effective April 29, 2013.

10-10-10. Creation; purpose.

Pursuant to the authority granted in Article III, Section IX, Paragraph VI(g) of the Constitution, there is hereby created the Invest Georgia Fund as a distinct component of the Seed-Capital Fund. The General Assembly declares that its purpose in creating the Invest Georgia Fund and enacting this legislation is to increase the amount of private investment capital available in this state for Georgia based business enterprises in the seed, early, or growth stages of business development and which require funding, as well as for established Georgia based business enterprises developing new methods or technologies, including the promotion of research and development purposes, thereby increasing employment, creating additional wealth, and otherwise benefitting the economic welfare of the people of this state. Accordingly, it is the intention of the General Assembly that the Invest Georgia Fund make investments in support of Georgia based business enterprises in accordance with the investment policy authorized and required under this article and focus its investment policy principally on venture capital funds and private equity organizations that invest in

Georgia based business enterprises. (Code 1981, § 10-10-10, enacted by Ga. L. 2013, p. 243, § 5/HB 318.)

10-10-11. Definitions.

As used in this article, the term:

(1) "Affiliate" means:

(A) A person who, directly or indirectly, beneficially owns, controls, or holds power to vote any outstanding voting securities or other voting ownership interests of a venture capital firm; or

(B) A person whose outstanding voting securities or other voting ownership interests are directly or indirectly beneficially owned, controlled, or held with power to vote by a venture capital firm.

(2) "Board" means the Invest Georgia Board created under Code Section 10-10-12.

(3) "Center" means the Advanced Technology Development Center.

(4) "Contributed capital" means the amount of money contributed to the Invest Georgia Fund by any authorized method.

(5) "Designated capital" means the amount of money committed and invested by the Invest Georgia Fund into individual early stage venture capital funds or growth stage venture capital funds.

(6) "Early stage venture capital fund" means:

(A) A fund that has at least one principal employed to direct the investment of the designated capital;

(B) A fund whose principals have at least five years of experience in the venture capital, angel capital, or private equity sector by investing primarily in Georgia domiciled companies or a fund whose managers have been based, as defined by having an office, in the State of Georgia;

(C) At the discretion of the fund administrator and the board, one or more early stage venture capital funds that are first-time Georgia based funds, so long as the fund managers have at least five years of experience in venture capital or angel capital investing in Georgia based business enterprises; and

(D) A fund which has as its primary investment strategy the achievement of transformational economic development outcomes through focused investments of capital in seed or early stage businesses with high growth potential. The fund principals must have demonstrated the ability to lead investment rounds, advise and mentor entrepreneurs, and facilitate follow-on investments. A

minimum of 10 percent of the committed capital of the fund must be committed by the institutional investors, fund principals, or other accredited investors.

(7) "Fund administrator" means a state appointed investment advisory firm consisting of experienced investment professionals that will actively pursue investment opportunities for the State of Georgia. The investment advisory firm will evaluate and select Georgia based venture capital funds, in conjunction with the Invest Georgia Board, through a rigorous due diligence process.

(8) "Growth stage venture capital fund" means:

(A) A fund having its principal office and a majority of its employees in Georgia that has at least two principals employed to direct the investment of the designated capital;

(B) A fund whose principals have at least five years of experience in the venture capital, angel capital, or private equity sector by investing primarily in Georgia domiciled companies or a fund whose principals have been based, as defined by having an office in the State of Georgia; and

(C) A fund which has as its primary investment strategy the achievement of transformational economic development outcomes through focused investments of capital in growth stage businesses with high return potential. The fund principals must have demonstrated the ability to lead investment rounds, advise and mentor entrepreneurs, and facilitate follow-on investments. A minimum of 50 percent of the committed capital of the fund must be committed by the institutional investors, fund principals, or other accredited investors.

(9) "Invest Georgia Fund" means the fund created under the provisions of Code Section 10-10-15 to hold the money collected for the purposes of this article.

(10) "Qualified distribution" means any distribution or payment by the Invest Georgia Fund in connection with any of the following:

(A) Costs and expenses of forming, syndicating, and organizing the Invest Georgia Fund, including fees paid for professional services, and the costs of financing and insuring the obligations of the Invest Georgia Fund, provided such payments are not made to a participating investor;

(B) An annual management fee in accordance with a fund's partnership agreement, and consistent with such fund's other private investors, to offset the costs and expenses of managing and operating the Invest Georgia Fund; or

(C) Reasonable and necessary fees in accordance with industry custom for ongoing professional services, including, but not limited to, legal and accounting services related to the operation of the Invest Georgia Fund, but not including any lobbying or governmental relations.

(11) "Qualified early stage business" or "seed" business means a business that, at the time of the first investment in the business by a venture capital firm:

(A) Has its headquarters located in the State of Georgia;

(B) Has its principal business operations located in the State of Georgia and intends to maintain its principal business operations in this state after receiving an investment from the venture capital firm. In order to discourage the business from relocating outside Georgia within three years from the date of an initial investment, the investment in the business shall be subject to redemption by the venture capital firm within one year from the time the business relocates its principal business operations outside this state, unless the business maintains a significant presence in Georgia as determined by relative number of employees or relative assets remaining in Georgia following the relocation;

(C) Has 20 or fewer employees;

(D) Has a current gross annual revenue run rate of less than $1 million;

(E) Has not obtained during its existence more than $2 million in aggregate cash proceeds from the issuance of its equity or debt investments, not including commercial loans from chartered banks or savings and loan institutions; and

(F) Does not engage substantially in:

(i) Retail sales;

(ii) Real estate development or construction;

(iii) Entertainment, amusement, recreation, or athletic or fitness activity for which an admission is charged;

(iv) The business of insurance, banking, lending, financial, brokerage, or investment activities;

(v) Natural resource extraction, including, but not limited to, oil, gas, or biomass; or

(vi) The provision of professional services by accountants, attorneys, or physicians.

A business classified as a qualified early stage business at the time of the first qualified investment in such business shall remain

classified as a qualified early stage business and may receive continuing qualified investments from venture capital firms participating in the Invest Georgia Fund. Continuing investments shall constitute qualified investments even though the business may not meet the definition of a qualified early stage business at the time of such continuing investments.

(12) "Qualified growth stage business" means a business that, at the time of the first investment in the business by a venture capital firm:

(A) Has its headquarters located in the State of Georgia;

(B) Is a corporation, limited liability company, or a general or limited partnership located in this state;

(C) Has its principal business operations located in the State of Georgia and intends to maintain its principal business operations in this state after receiving an investment from the venture capital firm. In order to discourage the business from relocating outside Georgia within three years from the date of initial investment, the investment in the business shall be subject to redemption by the venture capital firm within one year from the time the business relocates its principal business operations outside this state, unless the business maintains a significant presence in Georgia as determined by relative number of employees or relative assets remaining in Georgia following the relocation;

(D) Has 100 or fewer employees;

(E) Has a current gross annual revenue run rate of more than $1 million; and

(F) Does not engage substantially in:

(i) Retail sales;

(ii) Real estate development or construction;

(iii) Entertainment, amusement, recreation, or athletic or fitness activity for which an admission is charged;

(iv) The business of insurance, banking, lending, financial, brokerage, or investment activities;

(v) Natural resource extraction, including, but not limited to, oil, gas, or biomass; or

(vi) The provision of professional services by accountants, attorneys, or physicians.

A business classified as a qualified growth stage business at the time of the first qualified investment in such business shall remain

classified as a qualified growth stage business and may receive continuing qualified investments from venture capital firms participating in the Invest Georgia Fund. Continuing investments shall constitute qualified investments even though the business may not meet the definition of a qualified growth stage business at the time of such continuing investments.

(13) "Qualified investment" means the investment of money by the Invest Georgia Fund in each early stage venture capital fund or growth stage venture capital fund selected by the fund administrator. (Code 1981, § 10-10-11, enacted by Ga. L. 2013, p. 243, § 5/HB 318.)

10-10-12. Invest Georgia Board; creation; membership; powers.

(a) There is hereby created the Invest Georgia Board, which shall exercise the powers and perform the duties prescribed by this article. The exercise by the board of its powers and duties is hereby declared to be an essential state governmental function. The board shall be subject to all laws generally applicable to state agencies and public officials, to the extent those laws do not conflict with the provisions of this article.

(b) The board shall consist of three members appointed by the Governor, one member appointed by the Lieutenant Governor, and one member appointed by the Speaker of the House of Representatives. Each appointed member shall be a resident of Georgia and shall have experience in at least one of the following areas:

(1) Early stage, angel, or venture capital investing;

(2) Growth stage venture capital investing;

(3) Fund of funds management; or

(4) Entrepreneurship.

No member of the board shall be an affiliate of any venture capital fund that is selected to perform services for the board or of an insurance company.

(c) The commissioner of economic development and a member of the One Georgia Authority or their designees shall serve as nonvoting members of the board.

(d) Initial appointees to the board shall serve staggered terms, with all of the initial terms beginning within 30 days of April 29, 2013. The terms of one member appointed by the Governor and the members appointed by the Lieutenant Governor and the Speaker of the House of Representatives shall expire on December 31, 2016. The terms of the other two initial appointments by the Governor shall expire on December 31, 2018. Thereafter, terms of office for all appointees shall be for

four years, with each term ending on the same day of the same month as did the term that it succeeds. A vacancy on the board shall be filled in the same manner as the original appointment, except that a person appointed to fill a vacancy shall be appointed to the remainder of the unexpired term. Any appointed member of the board shall be eligible for reappointment.

(e) A member of the board may be removed by such member's appointing official for misfeasance, willful neglect of duty, or other cause, after notice and a public hearing, unless the notice and hearing are waived in writing by such member.

(f) Members of the board shall serve without compensation. The Governor shall designate a member of the board to serve as chairperson. A majority of the voting members of the board shall constitute a quorum, and the affirmative vote of a majority of the voting members present shall be necessary for any action taken by the board. A vacancy in the membership of the board shall not impair the right of a quorum to exercise all rights and perform all duties of the board.

(g) The board shall have the power:

(1) To have a seal and alter the same at its pleasure;

(2) To acquire by purchase, lease, or otherwise, including acquisition of land from the state government, and to hold, lease, and dispose of real and personal property of every kind and character for its corporate purpose and to enter into any contracts, leases, or other charges for the use of property or services of the board and collect and use the same as necessary to operate the board; and to accomplish any of the purposes of this article and make any purchases or sales necessary for such purposes;

(3) To acquire in its own name by purchase, on such terms and conditions and in such manner as it may deem proper, real property, or rights or easements therein, or franchises necessary or convenient for its corporate purpose, and to use the same so long as its corporate existence shall continue, and to lease or make contracts with respect to the use of such property, or dispose of the same in any manner it deems to be to the best advantage of the board;

(4) To appoint, select, and employ officers, agents, and employees, including real estate, environmental, engineering, architectural, and construction experts, fiscal agents, and attorneys, and to fix their respective compensations;

(5) To make contracts and leases and to execute all instruments necessary or convenient. Any and all persons, firms, and corporations and any and all political subdivisions, departments, institutions, authorities, or agencies of the state and federal government are

authorized to enter into contracts, leases, or agreements with the board upon such terms and for such purposes as they deem advisable; and, without limiting the generality of the foregoing, authority is specifically granted to municipal corporations, counties, political subdivisions, and to the board relative to entering into contracts, lease agreements, or other undertakings authorized between the board and private corporations, both inside and outside this state, and between the board and public bodies, including counties and cities outside this state and the federal government;

(6) To accept loans and grants of money or materials or property of any kind from the United States of America or any agency or instrumentality thereof upon such terms and conditions as the United States of America or such agency or instrumentality may require;

(7) To accept loans and grants of money or materials or property of any kind from the State of Georgia or any authority, agency, or instrumentality or political subdivision thereof upon such terms and conditions as the State of Georgia or such authority, agency, or instrumentality or political subdivision may require;

(8) To exercise any power usually possessed by private corporations performing similar functions, provided that no such power is in conflict with the Constitution or general laws of this state; and

(9) To do all things necessary or convenient to carry out the powers expressly given in this article.

(h) The center shall provide the board with office space and such technical assistance as the board requires, and the board shall be attached to the center for administrative purposes. The center shall also consult with the board in connection with the administration of the Invest Georgia Fund created under this article. (Code 1981, § 10-10-12, enacted by Ga. L. 2013, p. 243, § 5/HB 318.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2013, "beginning within 30 days of April 29, 2013" was substituted for "beginning within 30 days of the effective date of this Code section" in the first sentence of subsection (d).

10-10-13. Responsibilities of board.

The board's primary responsibilities shall include:

(1) Establishing an investment policy for the selection of a fund administrator;

(2) Selecting a fund administrator to administer the provisions of this article;

(3) Giving final approval to allocations of designated capital to the venture capital funds selected by the fund administrator;

(4) Executing and overseeing the contracts of the fund administrator in order to assure compliance with this article; and

(5) Establishing a policy with respect to use of capital and profits returned to the state pursuant to the provisions of Code Section 10-10-19. (Code 1981, § 10-10-13, enacted by Ga. L. 2013, p. 243, § 5/HB 318.)

10-10-14. Fund administrator; investments.

(a) The fund administrator shall be selected by the board through a transparent open bid process and shall be responsible for administering the Invest Georgia Fund and for making all venture capital fund selections in accordance with the investment policies developed by the board or contained in this article.

(b) The fund administrator shall be responsible for selecting a group of Georgia based venture capital funds in two categories, seed or early stage venture capital funds and growth stage venture capital funds.

(c) The early stage venture capital funds shall invest primarily in early or seed stage businesses and shall be selected using a transparent open bid process pursuant to guidelines developed by the board. The fund administrator shall ensure that a diverse cross section of industry sectors is represented by the selected funds, including technology, health care, life sciences, agribusiness, logistics, energy, and advanced manufacturing.

(d) The growth stage venture capital funds shall be selected using a transparent open bid process pursuant to guidelines developed by the board. The fund administrator shall ensure that a diverse cross section of industry sectors is represented by the selected funds, including technology, health care, life sciences, agribusiness, logistics, energy, and advanced manufacturing.

(e) In the selection of the early stage venture capital funds and the growth stage venture capital funds, the fund administrator shall consider the following factors:

(1) The management structure of the venture capital fund, including:

(A) The investment experience of the principals;

(B) The applicant's reputation in the venture capital firm industry and the applicant's ability to attract coinvestment capital and syndicate investments in qualified businesses in Georgia;

(C) The knowledge, experience, and capabilities of the applicant in subject areas relevant to venture stage businesses in Georgia; and

(D) The tenure and turnover history of principals and senior investment professionals of the venture capital fund;

(2) The venture capital fund's investment strategy, including:

(A) The applicant's record of performance in investing in early and growth stage businesses;

(B) The applicant's history of attracting coinvestment capital and syndicate investments;

(C) The soundness of the applicant's investment strategy and the compatibility of that strategy with business opportunities in Georgia; and

(D) The applicant's history of job creation through investment;

(3) The venture capital fund's commitment to making investments that, to the fullest extent possible:

(A) Create employment opportunities in Georgia;

(B) Lead to the growth of the Georgia economy and qualified businesses in Georgia;

(C) Complement the research and development projects of Georgia academic institutions; and

(D) Foster the development of technologies and industries that present opportunities for the growth of qualified businesses in Georgia; and

(4) The venture capital fund's commitment to Georgia, including:

(A) The applicant's presence in Georgia through permanent local offices or affiliation with local investment firms;

(B) The local presence of senior investment professionals;

(C) The applicant's history of investing in early and growth stage businesses in Georgia;

(D) The applicant's ability to identify investment opportunities through working relationships with Georgia research and development institutions and Georgia based businesses; and

(E) The applicant's commitment to investing an amount that matches or exceeds the amount of the applicant's designated capital received under this article in Georgia based qualified early stage businesses and qualified growth stage businesses.

(f) A venture capital fund shall file an application with the board in the form required by the fund administrator. The board shall begin accepting applications no later than 60 days after the initial appointments. (Code 1981, § 10-10-14, enacted by Ga. L. 2013, p. 243, § 5/HB 318.)

10-10-15. Expenditure of funds; capitalization; cost of administration.

(a) The Invest Georgia Fund is created as a separate fund maintained by the board, and moneys shall be expended only as provided in this article.

(b) The Invest Georgia Fund shall be capitalized through grants from the Seed-Capital Fund, designated appropriations to the center, and private contributions to the board.

(c) The capital raised shall be periodically distributed to the venture capital funds selected by the fund administrator pursuant to Code Section 10-10-14.

(d) All moneys appropriated to or otherwise paid into the Invest Georgia Fund shall be presumptively concluded to have been committed to the purpose for which they have been appropriated or paid and shall not lapse.

(e) The entire cost of administration of the Invest Georgia Fund, including expenses of the center incurred in connection with the creation, operation, management, liquidation, and investment of fund moneys may be paid from the assets of the Invest Georgia Fund. (Code 1981, § 10-10-15, enacted by Ga. L. 2013, p. 243, § 5/HB 318.)

10-10-16. Five-year funding period.

The Invest Georgia Fund may be funded over a five-year period through guidelines developed by the board. In the first year of the Invest Georgia Fund, the state may provide $10 million to the Invest Georgia Fund; in the second year, $15 million; in the third year, $15 million; in the fourth year, $25 million; and in the fifth year, $35 million. (Code 1981, § 10-10-16, enacted by Ga. L. 2013, p. 243, § 5/HB 318.)

10-10-17. Allocation of designated capital.

(a) As soon as practicable after the board receives contributed capital, the board and each selected venture capital fund that has been allocated designated capital shall enter into a contract under which the allocated amount of designated capital shall be committed by the board to the selected venture capital funds for investment pursuant to this article.

(b) The board shall allocate designated capital as follows:

(1) Early stage venture capital funds: 40 percent of the total contributed capital in the Invest Georgia Fund shall be allocated among the early stage venture capital funds, in accordance with the following eligibility conditions and requirements:

(A) Each early stage venture capital fund shall be eligible for a minimum of $10 million, up to a maximum of $15 million allocation over a five-year period or in accordance with the early stage venture capital fund's partnership agreement and concurrent with the contributions of the early stage venture capital fund's other investors;

(B) Each early stage venture capital fund shall be required to obtain other independent investors. A minimum of 10 percent of the committed capital of the early stage venture capital fund shall be committed by independent institutional investors, early stage venture capital fund principals, or other accredited investors; and

(C) Each early stage venture capital fund shall be required to commit, via a side letter or otherwise, to invest in Georgia based qualified early stage businesses and qualified growth stage businesses an amount that matches or exceeds the amount of the early stage venture capital fund's designated capital received under this article;

(2) Growth stage venture capital funds: 60 percent of the total contributed capital in the Invest Georgia Fund shall be allocated among the growth stage venture capital funds, in accordance with the following eligibility conditions and requirements:

(A) Each growth stage venture capital fund shall be eligible for an allocation of a minimum of $10 million designated capital over a five-year period or in accordance with the growth stage venture capital fund's partnership agreement and concurrent with the contributions of the growth stage venture capital fund's other investors;

(B) Each growth stage venture capital fund shall be required to obtain other independent investors. A minimum of 50 percent of the committed capital of the growth stage venture capital fund shall be committed by independent institutional investors, growth stage venture capital fund principals, or other accredited investors; and

(C) Each growth stage venture capital fund shall be required to commit, via a side letter or otherwise, to invest in Georgia based qualified early stage businesses and qualified growth stage businesses an amount that matches or exceeds the amount of the growth stage venture capital fund's designated capital received

under this article. (Code 1981, § 10-10-17, enacted by Ga. L. 2013, p. 243, § 5/HB 318.)

10-10-18. Reports.

(a) Not later than December 31 of each year, each venture capital fund shall report to the board:

(1) The amount of designated capital remaining uninvested at the end of the preceding calendar year;

(2) All qualified investments made during the preceding calendar year, including the number of employees of each business at the time the qualified investment was made and as of December 31 of that year;

(3) For any qualified investment in which the venture capital fund no longer has a position as of the end of the calendar year, the number of employees of the business as of the date the investment was terminated; and

(4) Any other information the board requires to ascertain the impact of this article on the economy of Georgia.

(b) Not later than 180 days after the end of its fiscal year, each venture capital fund shall provide to the board an audited financial statement that includes the opinion of an independent certified public accountant.

(c) Not later than 60 days after the sale or other disposition of a qualified investment, the selling venture capital fund shall provide to the board a report on the amount of the interest sold or disposed of and the consideration received for the sale or disposition. (Code 1981, § 10-10-18, enacted by Ga. L. 2013, p. 243, § 5/HB 318.)

10-10-19. Retention of designated capital and investment returns.

Designated capital and investment returns resulting from the qualified investments made under this article shall be retained and used to make additional qualified investments in venture capital funds selected by the fund administrator; provided, however, that the Invest Georgia Fund shall receive any and all returns representing the principal portion of designated capital and shall receive 80 percent of investment returns in excess of designated capital from each respective venture capital fund with the remaining 20 percent of investment returns in excess of designated capital retained by each respective venture capital fund in accordance with such venture capital fund's partnership agree-

ment. (Code 1981, § 10-10-19, enacted by Ga. L. 2013, p. 243, § 5/HB 318.)

10-10-20. Report on implementation of article.

(a)(1) On or before January 1, 2015, and January 1 of each subsequent year, the fund administrator, through the board, shall submit a report on the implementation of this article to the Governor, the Lieutenant Governor, the Speaker of the House of Representatives, and the chairpersons of the Senate Finance Committee and the House Committee on Ways and Means.

(2) The center shall also publish the report on the center's website in a publicly available format.

(3) The report published on the website shall not include any proprietary or confidential information.

(b) The report shall include:

(1) With respect to each venture capital fund or private equity organization that has received an allocation of designated capital:

(A) The name and address of the venture capital fund or private equity organization;

(B) The names of the individuals making qualified investments under this article;

(C) The amount of designated capital received during the previous year;

(D) The cumulative amount of designated capital received;

(E) The amount of designated capital remaining uninvested at the end of the preceding calendar year;

(F) The names and locations of qualified businesses receiving designated capital and the amount of each qualified investment;

(G) The annual performance of each qualified investment, including the qualified investment's fair market value as calculated according to generally accepted accounting principles; and

(H) The amount of any qualified distribution or nonqualified distribution taken during the prior year, including any management fee;

(2) With respect to the Invest Georgia Fund:

(A) The amount of designated capital received during the previous year;

(B) The cumulative amount of designated capital received;

(C) The amount of designated capital remaining uninvested at the end of the preceding calendar year;

(D) The names and locations of qualified businesses receiving designated capital and the amount of each qualified investment; and

(E) The annual performance of each qualified investment, including the qualified investment's fair market value as calculated according to generally accepted accounting principles; and

(3) With respect to the qualified businesses in which venture capital funds have invested:

(A) The classification of the qualified businesses according to the industrial sector and the size of the business;

(B) The total number of jobs created in Georgia by the investment and the average wages paid for the jobs; and

(C) The total number of jobs retained in Georgia as a result of the investment and the average wages paid for the jobs. (Code 1981, § 10-10-20, enacted by Ga. L. 2013, p. 243, § 5/HB 318.)

CHAPTER 13A

MASTER SETTLEMENT AGREEMENT ENHANCEMENTS

10-13A-4. Directory available via Internet; requirements for inclusion and maintenance; e-mail requirement for distributor.

Law reviews. — For annual survey on administrative law, see 61 Mercer L. Rev. 1 (2009).

CHAPTER 14

CEMETERY AND FUNERAL SERVICES

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cemeteries trust funds; nonperpetual care cemeteries; preneed escrow accounts.
10-14-5. Preneed sales agents; contracts; retention of employee data.
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10-14-7. Preneed escrow accounts or trust funds.
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10-14-17. Prohibited acts; fees.
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10-14-27. Evidence in civil or criminal actions under article [Repealed].

10-14-1. Short title.

JUDICIAL DECISIONS

Private rule prohibiting use of concrete vaults violated statute. — Trial court did not manifestly abuse the court's discretion by entering a permanent injunction preventing a cemetery group from implementing a rule established by a private cemetery owner to prohibit the use of concrete vaults in its cemeteries because the rule violated the Georgia Cemetery and Funeral Services Act of 2000, O.C.G.A. § 10-14-1 et seq., because it was not reasonable within the context of O.C.G.A. § 10-14-16(b). Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co., 307 Ga. App. 206, 704 S.E.2d 858 (2010).

10-14-3. Definitions.

As used in this chapter, the term:

(1) "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with another person. Solely for purposes of this definition, the terms "owns," "is owned," and "ownership" mean ownership of an equity interest, or the equivalent thereof, of 10 percent or more, and the term "person" means an individual, partnership, committee, association, corporation, or any other organization or group of persons.

(2) "Boards" mean the State Board of Cemeterians as described and authorized in Chapter 8B of Title 43 and the State Board of Funeral Service as described and authorized in Chapter 18 of Title 43.

(3) "Burial merchandise," "funeral merchandise," or "merchandise" means any personal property offered or sold by any person for use in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains.

(4) "Burial right" means the right to use a grave space, mausoleum, or columbarium for the interment, entombment, or inurnment of human remains.

(5) "Burial service" means any service other than a funeral service offered or provided by any person in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains.

(6) "Care and maintenance" means the perpetual process of keeping a cemetery and its lots, graves, grounds, landscaping, roads, paths, parking lots, fences, mausoleums, columbaria, vaults, crypts, utilities, and other improvements, structures, and embellishments in a well cared for and dignified condition, so that the cemetery does not become a nuisance or place of reproach and desolation in the community. As specified in the rules of the Secretary of State, care and maintenance may include, but is not limited to, any or all of the following activities: mowing the grass at reasonable intervals; raking and cleaning the grave spaces and adjacent areas; pruning of shrubs and trees; suppression of weeds and exotic flora; and maintenance, upkeep, and repair of drains, water lines, roads, buildings, and other improvements. Care and maintenance may include, but is not limited to, reasonable overhead expenses necessary for such purposes, including maintenance of machinery, tools, and equipment used for such purposes. Care and maintenance may also include repair or restoration of improvements necessary or desirable as a result of wear, deterioration, accident, damage, or destruction. Care and maintenance does not include expenses for the construction and development of new grave spaces or interment structures to be sold to the public.

(7) "Casket" means a container which is designed for the encasement and viewing of a dead human body.

(8) "Cemetery" means a place dedicated to and used, or intended to be used, for permanent interment of human remains. A cemetery may contain land or earth interments; mausoleum, a vault, crypt interments; a columbarium or other structure or place used or intended to be used for the inurnment of cremated human remains; or any combination of one or more of such structures or places. Such term shall not include governmentally owned cemeteries, fraternal cemeteries, cemeteries owned and operated by churches, synagogues, or communities or family burial plots.

(9) "Cemetery company" means any entity that owns or controls cemetery lands or property.

(10) "Columbarium" means a structure or building which is substantially exposed above the ground and which is intended to be used for the inurnment of cremated human remains.

(11) "Common business enterprise" means a group of two or more business entities that share common ownership in excess of 50 percent.

(12) "Cremation" includes any mechanical, chemical, thermal, or other professionally accepted process whereby a deceased human being is reduced to ashes. Cremation also includes any other mechanical, chemical, thermal, or other professionally accepted process whereby human remains are pulverized, burned, recremated, or otherwise further reduced in size or quantity.

(13) "Crypt" means a chamber of sufficient size to inter the remains of a deceased human being.

(14) "Entombment" means the disposition of a dead human body in a mausoleum, including without limitation a crypt, private mausoleum, or any other permanent above-ground structure not used for inurnment, but shall not include the opening and closing of a grave space, crypt, or niche or the installation of a vault.

(15) "Final disposition" means the final disposal of a deceased human being whether by interment, entombment, inurnment, burial at sea, cremation, or any other means and includes, but is not limited to, any other disposition of remains for which a segregated charge is imposed.

(16) "Funeral director" means any person licensed in this state to practice funeral directing pursuant to the provisions of Chapter 18 of Title 43.

(16.1) "Funeral director in full and continuous charge" means a funeral director who is approved by the State Board of Funeral Service to assume full responsibility for the operations of a particular funeral establishment and who shall ensure that said establishment complies with this chapter and with all rules promulgated pursuant thereto as provided in Chapter 18 of Title 43.

(17) "Funeral service" means any service relating to the transportation, embalming, cremation, and interment of a deceased human being, as further described in Code Section 43-18-1.

(18) "Grave space" or "lot" means a space of ground in a cemetery intended to be used for the interment in the ground of human remains.

(19) "Human remains" means the bodies of deceased human beings and includes the bodies in any stage of decomposition and the cremated remains.

(20) "Interment" means the burial of human remains but shall not include the opening and closing of a grave space, crypt, or niche or the installation of a vault.

(21) "Inurnment" means the disposition of the cremated remains of a deceased human being in any fashion, including without limitation

in a columbarium niche, cremorial, cremation bench, cremation rock, urn, or other container but shall not include the opening and closing of a grave space, crypt, or niche or the installation of a vault.

(22) "Mausoleum" means a structure or building which is substantially exposed above the ground and which is used, or intended to be used, for the entombment of human remains.

(23) "Mausoleum section" means any construction unit of a mausoleum which is acceptable to the Secretary of State and which a cemetery uses to initiate its mausoleum program or to add to its existing mausoleum structures.

(24) "Monument" means any product used for identifying or permanently decorating a grave site, including, without limitation, monuments, markers, benches, and vases and any base or foundation on which they rest or are mounted.

(25) "Niche" means a space used, or intended to be used, for the interment of the cremated remains of one or more deceased human beings.

(26) "Nonperpetual care" means any cemetery which does not offer perpetual care as defined in this Code section.

(27) "Outer burial container" or "vault" means an enclosure into which a casket is placed and includes, but is not limited to, containers made of concrete, steel, fiberglass, copper or other metals, polypropylene, sectional concrete enclosures, and crypts.

(28) "Perpetual care" means the care and maintenance and the reasonable administration of the cemetery grounds and buildings at the present time and in the future.

(29) "Person" or "entity" means an individual, a corporation, a limited liability company, a general or limited partnership, an association, a joint-stock company, a trust, or any type of incorporated or unincorporated organization.

(30) "Preneed contract" means any arrangement or method, of which the provider of burial or funeral merchandise or services has actual knowledge, whereby any person agrees to furnish burial or funeral merchandise or services in the future.

(31) "Preneed dealer" means every person, other than a salesperson registered under this chapter, who engages, either for all or part of his or her time, directly or indirectly, as agent, broker, or principal in the retail business of offering, selling, or otherwise dealing in funeral services or burial services or funeral or burial merchandise which is not attached to realty or delivered to the purchaser at the time of sale.

(32) "Preneed interment service" or "preneed service" means any service which is not performed at the time of sale and which is offered or provided by any person in connection with the interment of human remains, except those services offered regarding mausoleums and the normal and customary installation charges on burial or funeral merchandise.

(32.1) "Principal" means a sum set aside or escrowed exclusive of income or interest or other return thereon.

(33) "Sale" or "sell" means and shall include every contract of sale or disposition of burial rights, grave spaces, burial services, funeral services, or burial or funeral merchandise for value. The term "offer to sell," "offer for sale," or "offer" shall include any attempt or offer to dispose of, or solicitation of an offer to buy, grave spaces, burial rights, burial or funeral services, or burial or funeral merchandise for value. This definition shall not include wholesalers of burial or funeral merchandise.

(34) "Salesperson" or "sales agent" means an individual employed or appointed or authorized by a cemetery, cemetery company, or preneed dealer to sell grave spaces, burial rights, burial or funeral merchandise, burial or funeral services, or any other right or thing of value in connection with the final disposition of human remains. The owner of a cemetery, the executive officers, and general partners of a cemetery company shall not be deemed to be salespersons within the meaning of this definition unless they are paid a commission for the sale of said property, lots, rights, burial or funeral merchandise, or burial or funeral services.

(35) "Secretary of State" means the Secretary of State of the State of Georgia.

(36) "Solicitation" means any communication in the context of an offer or sale of grave spaces, burial or funeral merchandise, or burial or funeral services which directly or implicitly requests a response from the recipient. (Code 1981, § 44-3-131, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, § 1; Code 1981, § 10-14-3, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, §§ 1, 2/HB 910; Ga. L. 2007, p. 47, § 10/SB 103; Ga. L. 2007, p. 398, § 1/HB 391; Ga. L. 2008, p. 324, § 10/SB 455; Ga. L. 2012, p. 625, §§ 1, 6/HB 933.)

The 2012 amendment, effective July 1, 2012, in paragraph (2), substituted "'Boards' mean" for "'Board' means" at the beginning, and added "and the State Board of Funeral Service as described and authorized in Chapter 18 of Title 43" at the end; in paragraph (12), twice substituted "mechanical, chemical, thermal, or other professionally accepted" for "mechanical or thermal"; added paragraph (16.1); and, in paragraph (17), inserted "cremation," and deleted "paragraphs (10), (18), and (19) of" preceding "Code Section".

10-14-3.1. Authority of boards.

The boards shall have all administrative powers and other powers necessary to carry out the provisions of this chapter, including the authority to promulgate rules and regulations, and the Secretary of State shall delegate to the boards all such duties otherwise entrusted to the Secretary of State; provided, however, that the Secretary of State shall have sole authority over matters relating to the regulation of funds, trust funds, and escrow accounts and accounting and investigations concerning such matters but may delegate authority to the appropriate board for the review of such investigations and the determination as to disciplinary matters, necessary sanctions, and the enforcement of such decisions and sanctions. The State Board of Funeral Service shall have authority to promulgate rules and regulations and make disciplinary and sanctioning decisions relating to funeral services or funeral merchandise. The State Board of Cemeterians shall have authority to promulgate rules and regulations and make disciplinary and sanctioning decisions relating to burial services or burial merchandise. The Secretary of State may delegate to each board according to such duties and responsibilities of the boards. (Code 1981, § 10-14-3.1, enacted by Ga. L. 2006, p. 1087, § 2A/HB 910; Ga. L. 2012, p. 625, § 7/HB 933.)

The 2012 amendment, effective July 1, 2012, in the first sentence, twice substituted "boards" for "board" and added "but may delegate authority to the appropriate board for the review of such investigations and the determination as to disciplinary matters, necessary sanctions, and the enforcement of such decisions and sanctions" at the end; and added the second through fourth sentences.

10-14-4. Registration of dealers and cemeteries; perpetual care cemeteries trust funds; nonperpetual care cemeteries; preneed escrow accounts.

(a)(1) Unless exempt under this chapter, it shall be unlawful for any person to offer for sale or to sell any cemetery burial rights, mausoleum interment rights, columbarium inurnment rights, grave spaces, or other physical locations for the final disposition of human remains in this state unless such person is registered as or employed by and acting on behalf of and under the direction of a person registered as a cemetery owner pursuant to this Code section.

(2) Unless exempt under this chapter, it shall be unlawful for any person to offer for sale or sell burial or funeral merchandise or burial services in this state unless such person is registered as or employed by and acting on behalf of and under the direction of a person registered as a cemetery owner under this Code section, a funeral director under Chapter 18 of Title 43, or a burial or funeral merchandise dealer under this Code section.

(3) Unless exempt under this chapter, it shall be unlawful for any person to offer for sale or to sell any preneed burial or funeral merchandise or preneed burial services in this state unless such person is registered as a preneed dealer or preneed sales agent pursuant to this Code section.

(4) It shall be unlawful for any person to offer for sale or to sell any funeral services in this state unless such person is licensed as a funeral director under the provisions of Chapter 18 of Title 43.

(b)(1) Every person desiring to be a registered cemetery owner shall file with the Secretary of State a separate registration application for each cemetery owned in a form prescribed by the Secretary of State, executed and duly verified under oath by the applicant, if the applicant is an individual, or by an executive officer or general partner, if the applicant is a corporation or partnership, or by an individual of similar authority, if the applicant is some other entity, and containing the following information:

(A) The name, mailing address, and telephone number of the applicant, which for the purposes of this Code section shall be the legal owner of the land upon which the cemetery is located;

(B) The location and, if different from the information submitted for subparagraph (A) of this paragraph, the mailing address and telephone number of the cemetery;

(C) The location of all records of the applicant which relate to the cemetery;

(D) If the applicant is not a natural person, the names of the president, secretary, and registered agent if the applicant is a corporation, of each general partner if the applicant is a partnership, or of individuals of similar authority if the applicant is some other entity and their respective addresses and telephone numbers; the name and address of each person who owns 10 percent or more of any class of ownership interest in the applicant and the percentage of such interest; and the date of formation and the jurisdiction of organization of the applicant;

(E) A copy of cemetery rules and regulations, a certified copy of a certificate of existence or certificate of authority issued in accordance with Code Section 14-2-128 if the applicant is a corporation, and any amendments to such documents or any substantially equivalent documents. Any such document once filed with the Secretary of State pursuant to this chapter shall be deemed to be on file and incorporated into any subsequent renewal or filing of such cemetery registration; provided, however, that each applicant and registrant is under a continuing duty to update such filing and to

notify the Secretary of State regarding any changes or amendments to the articles of incorporation, bylaws, cemetery rules and regulations, or substantially equivalent documents, and provided, further, that any applicant or registrant shall furnish to the Secretary of State additional copies of any such document upon request;

(F) A description of any judgment or pending litigation to which the applicant or any affiliate of the applicant is a party and which involves the operation of the cemetery or could materially affect the business or assets of the applicant;

(G) Whether the applicant or any affiliate of the applicant owns any other entities in Georgia regulated by this chapter and, if so, the location, mailing address, telephone number, and type of registration of such other entities;

(H) A consent to service of process meeting the requirements of Code Section 10-14-24 for actions brought by the State of Georgia;

(I) The name and business address of each individual employed, appointed, or authorized by the applicant to offer for sale or to sell any grave lots, burial rights, burial or funeral merchandise, or burial services on behalf of the cemetery;

(J) A balance sheet of the applicant dated as of the end of the most recent fiscal year and in no event dated more than 15 months prior to the date of filing, which the Secretary of State shall treat as confidential and not open to public inspection;

(K) Evidence satisfactory to the Secretary of State that the applicant owns for the cemetery unencumbered fee simple title to contiguous land in the minimum acreage required by this chapter or by rules issued by the Secretary of State in accordance with this chapter, properly zoned for use as a cemetery, and dedicated for such use, and a copy of a plat of survey thereto, provided that nothing herein shall prohibit the encumbrance of the undeveloped portion of cemetery property for the purpose of securing debt incurred for the purpose of developing or improving such property;

(L) Evidence satisfactory to the Secretary of State that the applicant has recorded, in the public land records of the county in which the land described in subparagraph (K) of this paragraph is located, a notice that contains the following language:

NOTICE

The property described herein shall not be sold, conveyed, leased, mortgaged, or encumbered except as provided by the prior written approval of the Secretary of State, as provided in the Georgia Cemetery and Funeral Services Act of 2000.

Such notice shall have been clearly printed in boldface type of not less than ten points and may be included on the face of the deed of conveyance to the applicant or may be contained in a separate recorded instrument that contains a legal description of the property.

(M) The name, address, location, and telephone number of the perpetual care trust account depository or depositories, the names of the accounts, and the account numbers;

(N) The name, address, and telephone number of each trustee;

(O) A copy of a perpetual care trust fund agreement executed by the applicant and accepted by the trustee, and evidence satisfactory to the Secretary of State of the deposit into such account of the amount of the initial required deposit, the trust agreement being conditioned only upon issuance of a certificate of registration;

(P) Such other information and documents as the Secretary of State may require by rule; and

(Q) A filing fee of $100.00.

(2) Every person desiring to be a registered preneed dealer, other than a person already licensed by the Board of Funeral Service as a funeral services director in full and continuous charge or an owner of a cemetery licensed by the State Board of Cemeterians as a cemeterian, shall file with the Secretary of State a registration application in a form prescribed by the Secretary of State, executed and duly verified under oath by the applicant, if the applicant is an individual, or by an executive officer or general partner, if the applicant is a corporation or partnership, or by an individual of similar authority, if the applicant is some other entity, and containing the following information:

(A) The name of the applicant;

(B) The location, mailing address, and telephone number of the applicant's principal business location in Georgia and the same information for other locations where business is conducted, together with any trade names associated with each location;

(C) All locations of the records of the applicant which relate to preneed sales in Georgia;

(D) If the applicant is not a natural person, the names of the president, secretary, and registered agent if the applicant is a corporation, of each general partner if the applicant is a partnership, or of individuals of similar authority, if the applicant is some other entity and their respective addresses and telephone numbers; the name and address of each person who owns 10 percent or

more of any class of ownership interest in the applicant and the percentage of such interest; and the date of formation and the jurisdiction of organization of the applicant;

(E) A certified copy of a certificate of existence or certificate of authority issued in accordance with Code Section 14-2-128 if the applicant is a corporation;

(F) A description of any judgment or pending litigation to which the applicant or any affiliate of the applicant is a party and which involves the operation of the applicant's preneed business in Georgia or which could materially affect the business or assets of the applicant;

(G) Whether the applicant or any affiliate of the applicant owns any other entities in Georgia regulated by this chapter and, if so, the location, mailing address, telephone number, and type of registration of such other entities;

(H) A consent to service of process meeting the requirements of Code Section 10-14-24 for actions brought by the State of Georgia;

(I) A list of each individual employed, appointed, or authorized by the applicant to offer for sale or to sell any grave lots, burial rights, burial or funeral merchandise, or burial services on behalf of the applicant;

(J) A balance sheet of the applicant dated as of the end of the most recent fiscal year and in no event dated more than 15 months prior to the date of filing, which the Secretary of State shall treat as confidential and not open to public inspection;

(K) The name, address, location, and telephone number of the preneed trust or escrow account depository or depositories, the names of the accounts, and the account numbers;

(L) An executed copy of the trust or escrow agreement required by Code Section 10-14-7 or 10-14-7.1;

(M) The name, address, and telephone number of the trust or escrow agent;

(N) Such other information and documents as the Secretary of State may require by rule; and

(O) A filing fee of $250.00.

The provisions of this paragraph notwithstanding, a person licensed by the Board of Funeral Service as a funeral services director in full and continuous charge or an owner of a cemetery licensed by the State Board of Cemeterians as a cemeterian shall not be required to separately register as a preneed dealer provided that the require-

ments of subparagraphs (A) through (N) of this paragraph are satisfied.

(3) Every person desiring to be a registered burial or funeral merchandise dealer shall file with the Secretary of State a registration application in a form prescribed by the Secretary of State, executed and duly verified under oath by the applicant, if an individual, or by an executive officer or general partner, if the applicant is a corporation or partnership, or by an individual of similar authority, if the applicant is some other entity, and containing the following information:

(A) The name of the applicant;

(B) The location, mailing address, and telephone number of the applicant's principal business location in Georgia and the same information for other locations where business is conducted, together with any trade names associated with each location;

(C) All locations of the records of the applicant which relate to funeral or burial merchandise sales in Georgia;

(D) If the applicant is not a natural person, the names of the president, secretary, and registered agent if the applicant is a corporation, of each general partner if the applicant is a partnership, or of individuals of similar authority if the applicant is some other entity and their respective addresses and telephone numbers; the name and address of each person who owns 10 percent or more of any class of ownership interest in the applicant and the percentage of such interest; and the date of formation and the jurisdiction of organization of the applicant;

(E) A certified copy of a certificate of existence or certificate of authority issued in accordance with Code Section 14-2-128 if the applicant is a corporation;

(F) A description of any judgment or pending litigation to which the applicant or any affiliate of the applicant is a party and which involves the operation of the applicant's funeral or burial merchandise business in Georgia or which could materially affect the business or assets of the applicant;

(G) Whether the applicant or any affiliate of the applicant owns any other entities in Georgia regulated by this chapter and, if so, the location, mailing address, telephone number, and type of registration of such other entities;

(H) A consent to service of process meeting the requirements of Code Section 10-14-24 for actions brought by the State of Georgia;

(I) The name and business address of each individual employed, appointed, or authorized by the applicant to offer for sale or to sell any burial or funeral merchandise on behalf of the applicant;

(J) A balance sheet of the applicant dated as of the end of the most recent fiscal year and in no event dated more than 15 months prior to the date of filing, which the Secretary of State shall treat as confidential and not open to public inspection;

(K) Such other information and documents as the Secretary of State may require by rule;

(L) A filing fee of $100.00; and

(M) A bond, if required by the rules and regulations of the Secretary of State.

(c) The Secretary of State may approve an application only after he or she has conducted an investigation of the applicant and determined that such applicant is qualified by character, experience, and financial responsibility to conduct the business for which the applicant is seeking registration in a legal and proper manner. A registration application filed under this Code section shall become effective upon the issuing of a certificate of registration by the Secretary of State or at such earlier time as the Secretary of State determines.

(d) Every registration under this subsection shall expire on the first day of August of each year. The registration must be renewed with the Secretary of State each year by the submission of a renewal application containing the information required in an application for initial registration to the extent that such information had not been included in an application or renewal application previously filed together with a sworn statement that all information not provided remains accurate. The filing fee for renewal of registration shall be $50.00 for each cemetery of cemetery owners, $100.00 for preneed dealers, and $50.00 for burial or funeral merchandise dealers.

(e) The Secretary of State, by rule, may provide for exceptions from registration for cemeteries when the Secretary of State determines that the public interest does not require registration, provided that such cemeteries are in existence on or before July 1, 2000, consist of less than 25 acres, and are operated by nonprofit entities.

(f) Notwithstanding any provision to the contrary contained in this Code section, the following shall be exempt from registration as a burial or funeral merchandise dealer:

(1) Any registered cemetery owner;

(2) The owner of any cemetery exempt from registration with respect to sales of burial or funeral merchandise sold for use at such cemetery;

(3) Any licensed funeral director;

(4) Any person providing interment and disinterment services exclusively at cemeteries exempt from registration;

(5) Any monument manufacturer or dealer which does not install monuments in cemeteries required to be registered by this Code section;

(6) Any person who does not offer for sale or sell burial or funeral services or merchandise to the general public; and

(7) Any registered preneed dealer.

In addition, the Secretary of State, by rule, may provide for other exceptions from registration.

(g)(1) Any cemetery in operation on August 1, 1986 which offers perpetual care for some designated sections of its property but does not offer perpetual care to other designated sections shall be considered a perpetual care cemetery for purposes of this chapter. No cemetery formed or created on or after July 1, 2000, may fail to offer perpetual care for any part of such cemetery.

(2) Any nonperpetual care cemetery which was registered with the Secretary of State prior to August 1, 1986, may continue to be operated as such after that date and a renewal of such registration shall not be required.

(3) Any nonperpetual care cemetery which is shown to be of historical significance and is operated solely for historical nonprofit purposes shall be exempt from registration.

(4) Except as specifically authorized under paragraphs (2) and (3) of this subsection, from and after August 1, 1986, it shall be unlawful for any person to operate or establish a nonperpetual care cemetery. (Code 1981, § 44-3-134, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, §§ 4-6; Ga. L. 1994, p. 329, § 1; Ga. L. 1998, p. 128, § 44; Code 1981, § 10-14-4, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2012, p. 625, § 8/HB 933.)

The 2012 amendment, effective July 1, 2012, in paragraph (b)(2), in the introductory paragraph, inserted ", other than a person already licensed by the Board of Funeral Service as a funeral services director in full and continuous charge or an owner of a cemetery licensed by the State Board of Cemeterians as a cemeterian," near the middle; inserted "trust or" in subparagraphs (b)(2)(K) through (b)(2)(M); added "or 10-14-7.1" at the end of subparagraph (b)(2)(L); and added the ending undesignated paragraph following subparagraph (b)(2)(O).

10-14-5. Preneed sales agents; contracts; retention of employee data.

(a) All individuals who offer preneed contracts to the public, or who execute preneed contracts on behalf of any entity required to be registered as a preneed dealer, and all individuals who offer, sell, or sign contracts for the preneed sale of burial rights shall be registered with the Secretary of State as preneed sales agents, pursuant to this Code section, unless such individuals are exempted under this chapter or individually own a controlling interest in a preneed dealer registered under this chapter. For purposes of this chapter, any person licensed by or registered with the Board of Funeral Service as a funeral services director in full and continuous charge or an owner of a cemetery licensed by the State Board of Cemeterians as a cemeterian shall be deemed a registered preneed dealer, and regulated pursuant to the rules governing same, by virtue thereof.

(b) All preneed sales agents must be employed by a registered preneed dealer.

(c) A preneed dealer shall be liable for the activities of all preneed sales agents who are employed by the preneed dealer or who perform any type of preneed related activity on behalf of the preneed dealer. If a preneed sales agent violates any provision of this chapter, such preneed sales agent and each preneed dealer who employs such preneed sales agent shall be subject to the penalties and remedies set out in Code Sections 10-14-11, 10-14-19, 10-14-20, and 10-14-21.

(d) A preneed sales agent may be authorized to sell, offer, and execute preneed contracts on behalf of all entities owned or operated by the agent's sponsoring preneed dealer.

(e) If the application for his or her registration is sent by certified mail, return receipt requested, or statutory overnight delivery, an individual may begin functioning as a preneed sales agent as soon as a completed application for registration, as set forth in subsection (g) of this Code section, is submitted to the Secretary of State, provided that, if any such sales agent fails to meet the qualifications set forth in this chapter, the preneed dealer shall immediately upon notification by the Secretary of State cause such agent to cease any sales activity on its behalf.

(f) The qualifications for a preneed sales agent are as follows:

(1) The applicant must be at least 18 years of age;

(2) The applicant must not be subject to any order of the Secretary of State that restricts his or her ability to be registered as a preneed sales agent; and

(3) The applicant must not have been adjudicated, civilly or criminally, to have committed fraud or to have violated any law of any state involving fair trade or business practices, have been convicted of a misdemeanor of which fraud is an essential element or which involves any aspect of the funeral or cemetery business, or have been convicted of a felony.

(g) An application for registration as a preneed sales agent shall be submitted to the Secretary of State with an application fee of $100.00 by the preneed dealer on a form that has been designated by the Secretary of State and shall contain, at a minimum, the following:

(1) The name, address, social security number, and date of birth of the applicant and such other information as the Secretary of State may reasonably require of the applicant;

(2) The name, address, and license number of the sponsoring preneed dealer;

(3) A representation, signed by the applicant, that the applicant meets the requirements set forth in subsection (f) of this Code section;

(4) A representation, signed by the preneed dealer, that the applicant is authorized to offer, sell, and sign preneed contracts on behalf of the preneed dealer and that the preneed dealer has informed the applicant of the requirements and prohibitions of this chapter relating to preneed sales, the provisions of the preneed dealer's preneed contract, and the nature of the merchandise, services, or burial rights sold by the preneed dealer;

(5) A statement indicating whether the applicant has any type of working relationship with any other preneed dealer or insurance company; and

(6) A signed agreement by the applicant consenting to an investigation of his or her background with regard to the matters set forth in this Code section, including, without limitation, his or her criminal history.

(h) An individual may be registered as a preneed sales agent on behalf of more than one preneed dealer, provided that the individual has received the written consent of all such preneed dealers.

(i) A preneed dealer who has registered a preneed sales agent shall notify the Secretary of State within three business days of a change in such individual's status as a preneed sales agent with such preneed dealer or upon the occurrence of any other event which would disqualify the individual as a preneed sales agent.

(j) Upon receipt and review of an application that complies with all of the requirements of this Code section, the Secretary of State shall

register the applicant. The Secretary of State shall by rule provide for annual renewal of registration and a renewal fee of $50.00.

(k) Each cemetery registered under this chapter shall maintain in its files for a period of five years a properly completed and executed application for employment in a form prescribed by the Secretary of State for each employee, officer, independent contractor, or other agent directly or indirectly involved in cemetery or preneed sales or any person occupying a similar status or performing similar functions. If a request is made, said forms shall be made available for inspection by authorized representatives of the Secretary of State. (Code 1981, § 44-3-132, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 1468, § 2; Code 1981, § 10-14-5, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2012, p. 625, § 9/HB 933.)

The 2012 amendment, effective July 1, 2012, added the second sentence in subsection (a); in subsection (e), inserted "or statutory overnight delivery," near the beginning, and substituted "submitted" for "mailed" near the middle; and substituted "The Secretary of State" for "The department" in subsection (j).

10-14-5.1. Relationship between life insurance and funeral establishment.

Any individual engaged in the sale of life insurance shall not use the name of any funeral establishment or any price list which identifies the funeral establishment or any reference to a funeral establishment or crematory in connection with the sale of life insurance without the express written authorization of the funeral establishment. When a preneed funeral contract is funded by a life insurance policy, the funeral establishment shall be designated as the assignee of the death benefit payable under the policy in accordance with the terms of the preneed contract. (Code 1981, § 10-14-5.1, enacted by Ga. L. 2012, p. 625, § 10/HB 933.)

Effective date. — This Code section became effective July 1, 2012.

10-14-6. Irrevocable trust fund.

(a)(1) Each cemetery or cemetery company required to be registered by this chapter shall establish and maintain an irrevocable trust fund for each cemetery owned.

(2) For trust funds established on or after July 1, 2000, the initial deposit to said irrevocable trust fund shall be the sum of $10,000.00 and the deposit of said sum shall be made before selling or contracting to sell any burial right. No such initial deposit shall be required with respect to any cemetery for which there is an existing perpetual care account on July 1, 2000. The trust fund shall apply to sales or

contracts for sale of lots, grave spaces, niches, mausoleums, columbaria, urns, or crypts in which perpetual care has been promised or guaranteed.

(3) The initial corpus of the trust fund and all subsequent required deposits shall be deposited in a state bank, state savings and loan institution, savings bank, national bank, or federal savings and loan institution, whose deposits are insured by the Federal Deposit Insurance Corporation or other governmental agency, or a state or federally chartered credit union insured under 12 U.S.C. Section 1781 of the Federal Credit Union Act, or other depository or trustee which is approved by the Secretary of State or which meets the standards contained in the rules and regulations promulgated by the Secretary of State.

(4) Each perpetual care trust fund established on or after July 1, 2000, shall be named "The _____ Cemetery _____ Perpetual Care Trust Fund" with the first blank being filled by the name of the cemetery and the second blank being filled by the month and year of the establishment of such trust fund. If a cemetery has a perpetual care trust fund existing on July 1, 2000, and the perpetual care trust fund agreement permits, the cemetery may make additional deposits to such a trust fund on the condition that the entire corpus of the trust fund, any income earned by the trust fund, and any subsequent deposits to the trust fund are thereafter governed by the provisions of this chapter, the "Georgia Cemetery and Funeral Services Act of 2000," as it existed on July 1, 2000, except for the amount of the initial deposit to the trust fund. If a cemetery owner or company elects to establish a new perpetual care trust fund subject to the provisions of this chapter, the "Georgia Cemetery and Funeral Services Act of 2000," as it existed on July 1, 2000, any perpetual care trust fund which existed on July 1, 2000, is subject to the provisions of law in effect on the date of its establishment, and deposits for sales transacted on or after July 1, 2000, shall be deposited in the trust fund established on or after July 1, 2000. If a cemetery existing on July 1, 2000, has an existing perpetual care trust fund which complies with provisions of law in effect on the date of its establishment, a new trust fund created in compliance with this chapter shall not require an initial deposit.

(b) Whenever any burial right, cemetery lot, grave space, niche, mausoleum, columbarium, urn, or crypt wherein perpetual care or endowment care is promised or contracted for or guaranteed is sold by any cemetery, the cemetery shall make deposits to the trust fund that equal 15 percent of the sales price of the burial right or 7.5 percent of the total sales price of any mausoleums, niches, columbaria, urns, or crypts, provided that the minimum deposit for each burial right shall be

$50.00; provided, further, that on July 1, 2003, and every three years thereafter, the amount of said minimum deposit shall be adjusted by the rate of change in the Consumer Price Index as reported by the Bureau of Labor Statistics of the United States Department of Labor. The Secretary of State shall adopt such adjustment to the amount of said minimum deposit by rule. Deposits to the trust fund shall be made not later than 30 days following the last day of the month in which payment therefor is made, or, in the case of a free space, the month in which the space is given. In the event any sale is made on an installment basis, not less than a pro rata share of the principal portion of each payment made and allocated to the lot, grave, space, niche, mausoleum, columbarium, urn, or crypt shall be allocated to the required trust fund deposit, provided that all deposits to the trust fund shall be completed within six years from the date of the signing of the perpetual care contract. The manner of any such allocation shall be clearly reflected on the books of the registrant.

(c) The initial $10,000.00 corpus of the perpetual care trust fund shall not be counted as part of the required periodic deposits and shall be considered to be corpus or principal.

(d) The income earned by the trust fund shall be retained by the trust fund. At such time as either:

(1) The cemetery owner is not licensed and has not been licensed for 90 or more consecutive days to sell burial rights;

(2) The cemetery is under the management of a receiver; or

(3) Less than 50 percent of available lots are unsold,

95 percent of the income from the trust fund shall be paid to the owner or receiver exclusively for covering the costs of care and maintenance of the cemetery, including reasonable administrative expenses incurred in connection therewith. The income of the trust fund shall be paid to the owner or receiver at intervals agreed upon by the recipient and the trustee, but in no case shall the income be paid more often than monthly.

(e) There shall be no withdrawals from the trust fund except pursuant to the provisions of this chapter or by court order.

(f)(1) The assets of a trust fund shall be invested and reinvested subject to all the terms, conditions, limitations, and restrictions imposed by the laws of the State of Georgia upon executors and trustees regarding the making and depositing of investments with trust moneys pursuant to former Code Sections 53-8-1 through 53-8-4 as such existed on December 31, 1997, if applicable; Code Section 53-8-1; or Code Section 53-12-340. Subject to said terms, conditions, limitations, and restrictions, the trustee of the perpetual care trust

fund shall have full power to hold, purchase, sell, assign, transfer, reinvest, and dispose of any of the securities and investments in which any of the assets of said fund are invested, including proceeds of investments.

(2) Any state bank, national bank, or other financial institution authorized to act in a fiduciary capacity in this state, which presently or in the future serves as a fiduciary or cofiduciary of the trust fund of a perpetual care cemetery, may invest part or all of such trust fund held by it for investment in interests or participation in one or more common trust funds established by that state bank, national bank, or other financial institution for collective investment, if such investment is not expressly prohibited by the instrument, judgment, decree, or order creating the fiduciary relationship and if, in the case of cofiduciaries the trust institution procures the consent of its cofiduciary or cofiduciaries to such investment, and notwithstanding the fact that such common trust funds are not invested and reinvested subject to all the terms, conditions, limitations, and restrictions imposed by the laws of the State of Georgia upon executors and trustees in the making and disposing of their investments.

(3) Notwithstanding any other provision of this subsection, the Secretary of State shall establish rules and regulations for investments of a trust fund established on or after July 1, 2000, or otherwise governed by this chapter, the "Georgia Cemetery and Funeral Services Act of 2000," as it existed on July 1, 2000, as necessary to preserve the corpus and income of such a fund and for determining what restrictions are necessary for such purpose.

(4) At any time, in the event that the perpetual care trust fund contains an amount less than the amount required by this Code section, the cemetery owner shall, within 15 days after the earlier of becoming aware of such fact or having been so notified by the Secretary of State, deposit into the perpetual care trust fund an amount equal to such shortfall. In the event that the Secretary of State and the cemetery owner disagree regarding the amount of such shortfall, no penalty shall be imposed upon the cemetery owner for any failure to comply with this paragraph unless such failure occurs after notice and opportunity for a hearing as provided in Code Section 10-14-23.

(g) Moneys of the perpetual care trust fund shall not be invested in or loaned to any business venture controlled by the cemetery owner, a person who owns a controlling interest of a cemetery owner that is not a natural person, or an affiliate of any of these persons or entities.

(h) The trustee shall furnish yearly to the Secretary of State a financial report in a form designated by the Secretary of State with respect to the perpetual care trust fund.

(i) Upon a finding by a court of competent jurisdiction of failure to deposit or maintain funds in the trust account as required by this chapter or of fraud, theft, or misconduct by the owners of the cemetery or the officers or directors of a cemetery company which has wasted or depleted such funds, the cemetery owners or the officers or directors of a cemetery company may be held jointly and severally liable for any deficiencies in the trust account as required in this chapter. (Code 1981, § 44-3-134, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, §§ 4-6; Ga. L. 1994, p. 329, § 1; Ga. L. 1998, p. 128, § 44; Code 1981, § 10-14-6, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2010, p. 579, § 4/SB 131; Ga. L. 2011, p. 752, § 10/HB 142.)

The 2010 amendment, effective July 1, 2010, substituted "Code Section 53-8-1 of the 'Revised Probate Code of 1998,' or Code Section 53-12-340 of 'The Revised Georgia Trust Code of 2010.'" for "or Code Section 53-8-1 and Code Section 53-12-287 of the 'Revised Probate Code of 1998.'" at the end of the first sentence of paragraph (f)(1).

The 2011 amendment, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, substituted "former Code Sections 53-8-1 through 53-8-4 as such existed on December 31, 1997, if applicable; Code Section 53-8-1; or Code Section 53-12-340" for "Code Sections 53-8-1 through 53-8-4 of the 'Pre-1998 Probate Code,' if applicable, Code Section 53-8-1 of the 'Revised Probate Code of 1998,' or Code Section 53-12-340 of 'The Revised Georgia Trust Code of 2010.'" in the first sentence of paragraph (f)(1).

10-14-7. Preneed escrow accounts or trust funds.

(a)(1) Each preneed dealer which sells burial or funeral merchandise on a preneed basis or preneed burial or funeral services, other than preneed funeral services described in Code Section 10-14-7.1, shall establish and maintain a trust fund or a preneed escrow account.

(2) With respect to each monument and outer burial container, bench, coping, and other burial and funeral merchandise items except for caskets, and except as otherwise provided in paragraph (3) of this subsection, the amount to be deposited to said trust or escrow account shall be not less than 35 percent of the sales price of such monument or outer burial container; in no event shall the amount deposited be less than 120 percent of the wholesale price of such items. For caskets, the amount to be deposited to said trust or escrow account shall be not less than 100 percent of the sales price of such merchandise; in no event shall the amount deposited be less than 110 percent of the wholesale price of such merchandise. If the contract of sale shall include grave spaces or items not deemed to be burial or funeral merchandise, the portion of the sales price attributable to the sale of the burial or funeral merchandise shall be determined, and it shall only be as to such portion of the total contract as constitutes burial or funeral merchandise that the deposit described in this paragraph shall be required. In the event that the sale of burial or

funeral merchandise is under an installment contract, the required trust deposit shall be a pro rata part of the principal portion of each installment payment, such deposit only being required as payments are made by the purchaser for such burial or funeral merchandise. In the event the installment contract is discounted or sold to a third party, the seller shall be required to deposit an amount equal to the undeposited portion of the required deposit of the sales price of such burial or funeral merchandise at such time as if the contract were paid in full.

(3) With respect to a monument, outer burial container, bench, coping, and other burial and funeral merchandise items except for caskets, the itemized sales price of which does not include the installation of such item, 100 percent of the installation cost shall be deposited in the trust or escrow account.

(4) With respect to cash advance items and the sale of preneed funeral services, the amount to be deposited to said trust or escrow account shall be 100 percent of the sales price of such funeral services or the full amount of a cash advance item. The time and manner of deposit shall be the same as that specified for deposit of burial or funeral merchandise sale funds to the escrow account.

(5) With respect to preneed burial services, the amount to be deposited to said trust or escrow account shall be not less than 35 percent of the sales price of such burial services; in no event shall the amount deposited be less than 120 percent of the wholesale price of such burial services. The time and manner of deposit shall be the same as that specified for deposit of burial or funeral merchandise sale funds to the escrow account.

(b) The deposit specified in paragraphs (2), (3), (4), and (5) of subsection (a) of this Code section shall be made not later than 30 days following the last day of the month in which any payment is received.

(c) A preneed escrow account governed by the provisions of this Code section shall be established and maintained in a state bank, state savings and loan institution, savings bank, national bank, federal savings and loan association, whose deposits are insured by the Federal Deposit Insurance Corporation or other governmental agency, or a state or federally chartered credit union insured under 12 U.S.C. Section 1781 of the Federal Credit Union Act, or other organization approved by the Secretary of State which is located and doing business in this state.

(d)(1) If the account is maintained with a trustee, the assets of the trust fund shall be invested and reinvested by the trustee subject to all the terms, conditions, limitations, and restrictions imposed by Georgia law upon executors and trustees regarding the making and depositing of investments with trust moneys pursuant to Code

Sections 53-8-1 through 53-8-4 of the "Pre 1998 Probate Code," if applicable, or Code Sections 53-8-1 and 53-12-340 of the "Revised Probate Code of 1998," if applicable, or Chapter 12 of Title 53, "The Revised Georgia Trust Code of 2010." Subject to said terms, conditions, limitations, and restrictions, the trustee of the preneed accounts shall have full power to hold, purchase, sell, assign, transfer, reinvest, and dispose of any of the securities and investments in which any of the assets of said account are invested, including proceeds of investments.

(2) Any state bank, national bank, or other financial institution authorized to act in a fiduciary capacity in this state, which presently or in the future serves as a fiduciary or cofiduciary of the trust fund of a preneed dealer, may invest part or all of such trust fund held by it for investment in interests or participation in one or more common trust funds established by that state bank, national bank, or other financial institution for collective investment, if such investment is not expressly prohibited by the instrument, judgment, decree, or order creating the fiduciary relationship and if, in the case of cofiduciaries, the trust institution procures the consent of its cofiduciary or cofiduciaries to such investment, and notwithstanding the fact that such common trust funds are not invested and reinvested subject to all the terms, conditions, limitations, and restrictions imposed by the laws of the State of Georgia upon executors and trustees in the making and disposing of their investments.

(e)(1) For burial or funeral merchandise, funds shall be released from the trust or escrow account when the burial or funeral merchandise is delivered or, if the burial or funeral merchandise is not yet delivered, within the time required by law after a purchaser requests a refund. The preneed dealer is considered to have delivered burial or funeral merchandise when the burial or funeral merchandise is:

(A) Actually delivered to the purchaser at the time of need;

(B) Actually delivered to the purchaser at the purchaser's request;

(C) In the case of a monument, when the monument is attached to realty;

(D) In the case of a monument, when the preneed dealer has the monument manufactured for the purchaser and placed into storage with a responsible third party bonded and insured for the wholesale value thereof and evidenced by a receipt specifically identifying the monument, the specific preneed contract, the location of the monument, and identify and address of the bonding and insuring parties; or

(E) At such other times as prescribed by the rule or order of the Secretary of State.

Notwithstanding the foregoing, outer burial containers may not be delivered prior to need.

(2) Deposits made from funds received in payment of preneed services shall remain in the trust or escrow account until such services are performed, at which time said funds may be released to the preneed dealer. The trustee may require certification by the preneed dealer of delivery of merchandise or performance of services before release of funds.

(3) The funds on deposit under the terms of this subsection regarded as escrow funds may not be pledged, hypothecated, transferred, or in any manner encumbered by the escrow agent nor may said funds be offset or taken for the debts of the preneed dealer until such time as the merchandise has been delivered or the services performed, but after delivery of the burial or funeral merchandise concerned.

(f) At any time, in the event that the preneed trust or escrow account contains an amount less than the amount required by this Code section, the preneed dealer shall, within 15 days after the earlier of becoming aware of such fact or having been so notified by the Secretary of State, deposit into the preneed account an amount equal to such shortfall. In the event that the Secretary of State and the preneed dealer disagree regarding the amount of such shortfall, no penalty shall be imposed upon the preneed dealer for any failure to comply with this provision unless such failure occurs after notice and opportunity for a hearing as provided in Code Section 10-14-23.

(g) In the case of release of trusted or escrowed funds to a purchaser at the purchaser's request pursuant to subsection (e) of this Code section, a sum not less than the lesser of 10 percent of the trusted or escrowed amount or one-half of the interest earned or return upon such funds as of the date of release, as provided by the Secretary of State by rule or regulation, may be retained by the preneed dealer as an administrative fee for reimbursement of the preneed dealer for costs.

(h) The trustee shall furnish yearly to the Secretary of State a financial report in a form designated by the Secretary of State with respect to the preneed trust or escrow account.

(i) Trust funds shall not be invested in or loaned to any business venture controlled by the preneed dealer, a person who owns a controlling interest of a cemetery owner that is not a natural person, or an affiliate of any of these persons or entities.

(j) Upon a finding by a court of competent jurisdiction of failure to deposit or maintain funds in the preneed trust or escrow account as required by this chapter or of fraud, theft, or other misconduct by the

preneed dealer or the officers or directors of the preneed dealer which has wasted or depleted such funds, the preneed dealer or the officers or directors of the preneed dealer may be held jointly and severally liable for any deficiencies in the preneed trust or escrow account. (Code 1981, § 44-3-134, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, §§ 4-6; Ga. L. 1994, p. 329, § 1; Ga. L. 1998, p. 128, § 44; Code 1981, § 10-14-7, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, § 3/HB 910; Ga. L. 2012, p. 625, § 11/HB 933.)

The 2012 amendment, effective July 1, 2012, in paragraph (a)(1), inserted ", other than preneed funeral services described in Code section 10-14-7.1," and inserted "trust fund or a" near the end; in paragraph (a)(2), in the first sentence, inserted "bench, coping, and other burial and funeral merchandise items except for caskets,", inserted "trust or" near the middle, substituted "120 percent" for "110 percent", and substituted "items" for "monument or outer burial container" at the end, and, near the beginning of the second sentence, substituted "caskets" for "any other burial or funeral merchandise" and inserted "trust or"; in paragraph (a)(3), substituted "monument, outer burial container, bench, coping, and other burial and funeral merchandise items except for caskets," for "monument or outer burial container" near the beginning and inserted "trust or" near the end; in the first sentence of paragraph (a)(4), deleted "or burial" preceding "services" twice and inserted "trust or" near the middle; added paragraph (a)(5); substituted "paragraphs (2), (3), and (4), and (5)" for "paragraphs (2) and (3)" near the beginning of subsection (b); substituted "A preneed escrow account governed by the provisions of this Code section" for "The preneed escrow account" near the beginning of subsection (c); added subsection (d); redesignated former subsections (d) through (e.1) as present subsections (e) through (g), respectively; rewrote present subsection (e); inserted "trust or" near the beginning of the first sentence of present subsection (f); in present subsection (g), inserted "trusted or" twice, substituted "subsection (e)" for "paragraph (1) of subsection (d)" near the beginning, inserted "or return" near the middle, and substituted "an administrative fee for reimbursement of the preneed dealer for costs" for "administrative costs" at the end; added subsections (h) and (i); redesignated former subsection (f) as present subsection (j); and inserted "trust or" twice in present subsection (j).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, "Section" was substituted for "section" in paragraph (a)(1) and "paragraphs (2), (3), (4), and (5)" was substituted for "paragraphs (2), (3), and (4), and (5)" in subsection (b).

10-14-7.1. Trust accounts for preneed funds.

(a) Notwithstanding any provision to the contrary contained in Chapter 1 of Title 7, the "Financial Institutions Code of Georgia," or in any other provision of law, a preneed dealer registered or deemed registered pursuant to Code Section 10-14-5 who provides funeral services shall provide for funds to be deposited in an escrow account pursuant to Code Section 10-14-7 or with a depository institution in accordance with this Code section and placed in an individual trust fund account that is:

(1) Titled in the name of a funeral establishment;

(2) Established for the purpose of providing preneed funeral services;

(3) Payable upon the death of the purchaser in favor of a funeral establishment for purposes of providing funeral services; and

(4) Refundable to the purchaser's designee or the estate of the deceased, such that 100 percent of the trust funds following a deduction of any amounts paid or owing as taxes and a 3 percent charge for administrative costs shall be returned to the designee or estate where funeral services are not provided by the funeral establishment.

(b)(1) One hundred percent of funds to be held in trust shall be deposited in the trust account. The deposit of such funds shall be made not later than 30 days following the last day of the month in which any payment is received. Trust fund accounts shall be established and maintained in a state bank, state savings and loan institution, savings bank, national bank, federal savings and loan association, whose deposits are insured by the Federal Deposit Insurance Corporation or other governmental agency, or a state or federally chartered credit union insured under 12 U.S.C. Section 1781 of the Federal Credit Union Act, or other organization approved by the Secretary of State which is located and doing business in this state.

(2)(A) If the account is maintained with a trustee, the assets of the trust account shall be invested and reinvested by the trustee subject to all the terms, conditions, limitations, and restrictions imposed by Georgia law upon executors and trustees regarding the making and depositing of investments with trust moneys and subject to the limitations and restrictions imposed pursuant to this Code section.

(B) Subject to said terms, conditions, limitations, and restrictions, the trustee of a preneed account shall have full power to hold, purchase, sell, assign, transfer, reinvest, and dispose of any of the securities and investments in which any of the assets of said account are invested, including proceeds of investments. A personal representative shall be authorized to invest funds in:

(i) Interest-bearing deposits in any chartered state or national bank or trust company or savings and loan association located in this state to the extent the deposits are insured by the Federal Deposit Insurance Corporation or comparable insurance; and

(ii) Direct and general obligations of the United States government, obligations unconditionally guaranteed by the United States government, and obligations of the agencies of the United States government enumerated in Code Section 53-8-3.

(C) In making investments pursuant to subparagraph (b)(2)(B) of this Code section and in acquiring and retaining those investments and managing the property of the estate, the personal representative shall exercise the judgment and care, under the circumstances then prevailing, which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

(3) In the event that the sale of burial or funeral merchandise is under an installment contract, the required trust deposit shall be a pro rata part of the principal portion of each installment payment, such deposit only being required as payments are made by the purchaser for such burial or funeral merchandise.

(c) The trustee shall furnish yearly to the Secretary of State a financial report in a form designated by the Secretary of State with respect to the preneed trust or escrow account.

(d) Upon a finding by a court of competent jurisdiction of failure to deposit or maintain funds in the trust account as required by this Code section or of fraud, theft, or misconduct by a funeral establishment or a funeral director or his or her employee, representative, or agent which has wasted or depleted such funds, the funeral establishment owners, funeral director, or employee, representative, or agent of a funeral director or establishment may be held jointly and severally liable for any deficiencies in the trust account.

(e) Any other provision of law notwithstanding, a trust fund account established and maintained under this Code section and the moneys contained therein shall not be deemed an asset or income for purposes of recapture of income or funds owed or for any other purpose.

(f) Nothing contained herein shall preclude a licensed funeral director in full and continuous charge from maintaining an escrow account with aggregate escrow funds for 100 percent of any preneed contract amount for purposes of passing through funds within 60 days to a trust fund account or payment of a policy of insurance for preneed services. (Code 1981, § 10-14-7.1, enacted by Ga. L. 2012, p. 625, § 12/HB 933.)

Effective date. — This Code section became effective July 1, 2012.

10-14-16. Cemetery rules and regulations; service charges.

JUDICIAL DECISIONS

Unreasonable rule on vaults. — Trial court did not manifestly abuse the court's discretion by entering a permanent injunction preventing a cemetery group from implementing a rule established by a private cemetery owner to prohibit the use of concrete vaults in the company's cemeteries because the rule violated the Georgia Cemetery and Funeral Services Act of 2000, O.C.G.A. § 10-14-1 et seq., and the rule was not reasonable within the context of O.C.G.A. § 10-14-16(b). Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co., 307 Ga. App. 206, 704 S.E.2d 858 (2010).

10-14-17. Prohibited acts; fees.

(a) It shall be unlawful for any person:

(1) To sell or offer to sell any burial rights, burial or funeral services, or burial or funeral merchandise by means of any oral or written untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, if such person shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission;

(2) To sell or offer to sell any, burial rights, burial or funeral services, or burial or funeral merchandise in violation of any provision of this chapter or rule, regulation, or order promulgated or issued by the Secretary of State under any provision of this chapter;

(3) Except as otherwise provided in paragraph (4) of this subsection, in connection with the sale of preneed merchandise or services requiring funds to be deposited into a preneed escrow account, to fail to refund, within three business days of the request of the purchaser or the purchaser's heirs or assigns, the sales prices plus applicable interest as determined according to rules promulgated by the Secretary of State, provided that such request is made prior to the earlier of:

(A) The delivery of the merchandise or services; or

(B) The death of the person for whose interment or inurnment the merchandise or services are intended to be used.

Certain solicitations during a person's last illness relating to refunds shall be a violation of Part 2 of Article 15 of Chapter 1 of this title, the "Fair Business Practices Act of 1975," as set out in Code Section 10-1-393.7;

(4) In connection with the sale of monuments or vaults, to fail to refund within three business days of the request of the purchaser or the purchaser's heirs or assigns the full sales price, without interest, provided that such request is made prior to the earlier of:

(A) The delivery of the merchandise or services; or

(B) The death of the person for whose interment or inurnment the monument or vault is intended to be used.

Certain solicitations during a person's last illness relating to refunds shall be a violation of Part 2 of Article 15 of Chapter 1 of this title, the "Fair Business Practices Act of 1975," as set out in Code Section 10-1-393.7;

(5) To misappropriate, convert, illegally withhold, or fail to account for any trust funds, escrow funds, or other funds established or maintained pursuant to this chapter;

(6) Knowingly to cause to be made, in any document filed with the Secretary of State or in any proceeding under this chapter, any statement which is, at the time it is made and in the light of the circumstances under which it is made, false or misleading in any material respect;

(7) To sell, offer to sell, solicit offers to buy, or otherwise engage in the sale of funeral services if such person is not a licensed funeral director;

(7.1) To sell, offer to sell, solicit offers to buy, or otherwise engage in the sale of burial rights or burial merchandise if such person is not registered pursuant to the provisions of this chapter; or

(8) To sell any grave space which has not been platted and pinned.

(b) It shall be unlawful for any person in connection with the ownership, offer, sale, or purchase of any burial rights, burial or funeral services, or burial or funeral merchandise, directly or indirectly:

(1) To employ any device, scheme, or artifice to defraud; or

(2) To engage in any transaction, act, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser or seller.

(c) In connection with the sale or installation of merchandise, it shall be unlawful for a cemetery company to:

(1) Impose any condition upon the installation of merchandise obtained from a third party, other than to require installation by a registrant under this chapter or as may be otherwise permitted by the rules and regulations of the Secretary of State;

(2) Charge a fee for the installation of merchandise purchased or obtained from and to be installed by a person or firm other than the cemetery company or its agents, provided that the cemetery owner may charge a fee not to exceed $125.00 to reimburse the cemetery owner for its reasonable costs incurred in assisting in the siting of a monument on the lot on which it is to be installed, supervision and inspection of the installation to ensure compliance with the rules and regulations of the cemetery, and any administrative functions associated with the installation; provided, further, any such fee is properly disclosed and published as required by this chapter and charged regardless of whether the installer is or is not the cemetery owner or affiliated therewith;

(3) Refuse to mark the place on the grave where the merchandise is to be installed and inspect the installation when completed to ensure compliance with cemetery rules and regulations;

(4) Require any person or firm that installs, places, or sets merchandise to pay any fee other than any fee charged pursuant to paragraph (2) of this subsection;

(5) Tie the purchase of any grave space or burial right to the purchase of merchandise from or through the seller or any other designated person or corporation;

(6) Refuse to provide care or maintenance for any portion of a grave site on which a monument has been placed, provided that installation has been in accordance with lawful rules and regulations of the cemetery;

(7) Attempt to waive liability with respect to damage caused by cemetery employees or agents to merchandise after installation, where merchandise or installation service is not purchased from the cemetery company providing grave space or from or through any other person or corporation designated by the person authorized to sell grave space or the cemetery company providing grave space; provided, however, that no cemetery company may be held liable for the improper installation of merchandise where merchandise is not installed by the cemetery company or its agents;

(8) After the promulgation of rules and regulations relating to the subject matter of this subsection by the Secretary of State, to require any person who installs, places, or sets merchandise to obtain any form of insurance, bond, or surety or make any form of pledge, deposit, or monetary guarantee as a condition of entry or access to cemetery property or the installation of merchandise thereon, other than as may be in accordance with said rules and regulations.

(d) Other than fees for the processing and for the sale of burial rights, burial or funeral merchandise, and burial or funeral services, no

other fee may be directly or indirectly charged, contracted for, or received by a cemetery company as a condition for a customer to use any burial right, burial or funeral merchandise, or burial or funeral service, except for:

(1) Charges paid for opening and closing a grave and vault installation;

(2) Charges paid for transferring burial rights from one purchaser to another; however, no such fee may exceed $75.00 and such fee must have been disclosed in writing to the owner at the time of the initial purchase of the burial right from the cemetery;

(3) Charges for sales, documentary, excise, and other taxes actually and necessarily paid to a public official, which charges must be supported in fact;

(4) Charges for credit life and credit disability insurance, but only as requested by the purchaser, and the premiums for which do not exceed the applicable premium chargeable in accordance with the rates filed with the Insurance Commissioner; or

(5) Charges for interest on unpaid balances in accordance with applicable law.

Nothing herein shall prohibit a cemetery company from charging a reasonable fee for services it provides in connection with a lawful disinterment, provided such charges do not exceed the greater of the cemetery company's normal and customary charges for interment or the actual costs incurred by the cemetery directly attributable to such disinterment. Nothing herein shall prohibit a cemetery from charging a reasonable fee for actual costs it incurs due to the commencement of a funeral service at a time other than previously agreed by the cemetery company, the funeral establishment, and the owner of the burial rights, or his or her heirs and assigns, provided such charges are calculated in a manner which is disclosed and published as required by this chapter and that such charges are directly attributable to extra costs incurred by the cemetery company due to such late commencement.

(e) In connection with the sale of burial rights, burial or funeral merchandise, or burial or funeral services, it shall be unlawful for any person to fail to comply with the provisions of Article 1 of Chapter 1 of this title, "The Georgia Retail Installment and Home Solicitation Sales Act" or Part 2 of Article 15 of Chapter 1 of this title, the "Fair Business Practices Act of 1975." For the purposes of this subsection, burial rights, burial or funeral services, and burial or funeral merchandise shall constitute goods as that term is used in said article and said part.

(f) In connection with the installation of a monument:

(1) It shall be unlawful for any person installing said monument to fail to comply with the lawful rules and regulations of the cemetery regarding monument installation, provided that said rules and regulations are provided in writing to the installer prior to the installation. In the event such installation is not in conformity with said rules and regulations, the installer shall be liable to the cemetery for the actual cost of correcting such installation so it will be in conformity, provided that:

(A) The cemetery has notified the installer by certified mail, return receipt requested, of the reasons for the nonconformity not later than one year after the date of the installation; and

(B) The installer, provided it is registered under this chapter, shall have had not less than 30 days from its receipt of such notice to correct such nonconformity; and

(2) An installer of a monument shall be liable to the cemetery, to its customers, and to third persons for damages to their respective property and for other damages arising due to the negligence or intentional act of such installer, which liability may not be waived by contract.

(g) No program offering free burial rights may be conditioned on any requirement to purchase additional burial rights, burial or funeral merchandise, or burial or funeral services.

(h) The contract rights of any purchaser of preneed merchandise shall be freely transferable without fee except as provided in this chapter.

(i) It shall be unlawful for any owner or operator of a perpetual care cemetery to fail to provide care and maintenance for the cemetery.

(j) The fees set forth in this Code section shall be annually adjusted to the rate of change in the Consumer Price Index as reported by the Bureau of Labor Statistics of the United States Department of Labor. The Secretary of State shall adopt such adjustments to the amount of said fees by rule. (Code 1981, § 44-3-142, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-17, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, § 6/HB 910; Ga. L. 2012, p. 625, § 13/HB 933.)

The 2012 amendment, effective July 1, 2012, substituted "fees for the processing and for" for "the fees for" near the beginning of subsection (d).

10-14-18. Duties of registrant; written contract.

(a) A registrant offering to provide burial rights, burial or funeral merchandise, or burial or funeral services to the public shall:

(1) Provide by telephone, upon request, accurate information regarding the retail prices of burial or funeral merchandise and services offered for sale by the registrant;

(2) Fully disclose all regularly offered services and merchandise prior to the selection of burial rights, burial or funeral services, or burial or funeral merchandise. The full disclosure required shall identify the prices of all burial or rights, burial or funeral services, and burial or funeral merchandise provided by the registrant;

(3) Not make any false or misleading statements of the legal requirement as to the necessity of a casket or outer burial container;

(4) Provide a good faith estimate of all fees and costs the customer will incur to use any burial rights, merchandise, or services purchased;

(5) Provide to the customer a current copy of the rules and regulations of the registrant;

(6) Provide the registrant's policy on cancellation and refunds to each customer;

(7) Provide refunds if burial or funeral merchandise is not delivered as represented; and

(8) Provide the customer, upon the purchase of any burial right or burial or funeral merchandise or service, a written contract, the form of which has been filed with the Secretary of State.

(b) In a manner established by rule of the Secretary of State, the written contract shall provide on the signature page of the contract, clearly and conspicuously in boldface ten-point type or larger, the following:

(1) The words "purchase price" together with the sum of all items set out in the contract in accordance with subsection (d) of this Code section;

(2) The amount to be placed in trust;

(3) Either:

(A) A statement that no further expenses will be incurred at the time of need; or

(B) A statement that additional expenses will be incurred at the time of need, the registrant's current price for each such expense, and a statement that such prices may be expected to increase in the future; and

(4) The telephone number designated by the Secretary of State for questions and complaints.

(c) The written contract shall be completed prior to the signing of the contract by the customer and a copy of the contract shall be provided to the customer. As used in this subsection, the term "signing" includes any manual, facsimile, conformed, or electronic signature, and the term "electronic signature" means an electronic symbol or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

(d) The written contract shall provide an itemization of the amounts charged for all burial rights, burial or funeral services, burial or funeral merchandise, cash advances, and fees and other charges, which itemization shall be clearly and conspicuously segregated from everything else on the written contract.

(e) The written contract shall contain a description of the burial or funeral merchandise covered by the contract to include, when applicable, size, materials from which the burial or funeral merchandise is made, and other relevant specifications as may be required by the Secretary of State.

(f) The written contract shall disclose the location at which funeral services are to be provided and the space number of each lot or grave space. (Code 1981, § 10-14-18, enacted by Ga. L. 2000, p. 882, § 1; Ga. L. 2012, p. 625, § 2/HB 933.)

The 2012 amendment, effective July 1, 2012, added the second sentence in subsection (c).

10-14-27. Evidence in civil or criminal actions under article.

Reserved. Repealed by Ga. L. 2011, p. 99, § 18/HB 24, effective January 1, 2013.

Editor's notes. — This Code section was based on Code 1981, § 44-3-151, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-27, as redesignated by Ga. L. 2000, p. 882, § 1.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that the Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.